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ADDRESSES ON GOVERNMENT AND CITIZENSHIP

BY

ELIHU ROOT

COLLECTED AND EDITED BY

ROBERT BACON

AND

JAMES BROWN SCOTT

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INTRODUCTORY NOTE

THE collected addresses and state papers of Elihu Root, of which this is one of several volumes, cover the period of his service as Secretary of War, as Secretary of State, and as Senator of the United States, during which time, to use his own expression, his only client was his country.

The many formal and occasional addresses and speeches, which will be found to be of a remarkably wide range, are followed by his state papers, such as the instructions to the American delegates to the Second Hague Peace Conference and other diplomatic notes and documents, prepared by him as Secretary of State in the performance of his duties as an executive officer of the United States. Although the official documents have been kept separate from the other papers, this plan has been slightly modified in the volume devoted to the military and colonial policy of the United States, which includes those portions of his official reports as Secretary of War throwing light upon his public addresses and his general military policy.

The addresses and speeches selected for publication are not arranged chronologically, but are classified in such a way that each volume contains addresses and speeches relating to a general subject and a common purpose. The addresses as president of the American Society of International Law show his treatment of international questions from the theoretical standpoint, and in the light of his experience as Secretary of War and as Secretary of State, unrestrained and uncontrolled by the limitations of official position, whereas his addresses on foreign affairs, delivered while Secretary of State or as United States Senator, discuss these questions under the reserve of official responsibility.

Mr. Root's addresses on government, citizenship, and legal procedure are a masterly exposition of the principles of the Constitution and of the government established by it; of the duty of the citizen to understand the Constitution and to conform his conduct to its requirements; and of the right of the people to reform or to amend the Constitution in order to make representative government more effective and responsive to their present and future needs. The addresses on law and its administration state how legal procedure should be modified and simplified in the interest of justice rather than in the supposed interest of the legal profession.

The addresses delivered during the trip to South America and Mexico in 1906, and in the United States after his return, with their message of good will, proclaim a new doctrine — the Root doctrine — of kindly consideration and of honorable obligation, and make clear the destiny common to the peoples of the Western World.

The addresses and the reports on military and colonial policy made by Mr. Root as Secretary of War explain the reorganization of the army after the Spanish-American War, the creation of the General Staff, and the establishment of the Army War College. They trace the origin of and give the reason for the policy of this country in Cuba, the Philippines, and Porto Rico, devised and inaugurated by him. It is not generally known that the so-called Platt Amendment, defining our relations to Cuba, was drafted by Mr. Root, and that the Organic Act of the Philippines was likewise the work of Mr. Root as Secretary of War.

The argument before The Hague Tribunal in the North Atlantic Fisheries Case is a rare if not the only instance of a statesman appearing as chief counsel in an international arbitration, which, as Secretary of State, he had prepared and submitted.

The political, educational, historical, and commemorative speeches and addresses should make known to future generations the literary, artistic, and emotional side of a statesman of our time, and the publication of these collected addresses and state papers will, it is believed, enable the American people better to understand the generation in which Mr. Root has been a commanding figure and better to appreciate during his lifetime the services which he has rendered to his country.

ROBERT BACON.
JAMES BROWN SCOTT.

APRIL 15, 1916.

THE CITIZEN'S PART IN GOVERNMENT

PREFATORY REMARKS

GENTLEMEN OF YALE UNIVERSITY:

In delivering the lectures of 1907 [1] on the responsibilities of citizenship, upon the foundation established by the late William Earl Dodge, I look back with pleasure to nearly forty years of friendship with Mr. Dodge, and to the example which his whole life gave of unselfish public spirit and of unremitting and intelligent effort for the welfare of his country and of his fellow-men. The establishment of this lectureship is but one of a multitude of acts which expressed his constant solicitude for the welfare of others and his grateful appreciation of all the blessings he owed to the just and equal laws, the liberty, and the opportunities of his country. His life was a better lesson in the responsibility of Christian citizenship than any lecturer can put into words; for he did what we write about and he proved what we assert.

It is my purpose to speak to you of your responsibilities regarding the government of your country and to discuss:

1. The task inherited or assumed by members of the governing body in a democracy.
2. The function of political parties as agencies of the governing body.
3. The duties of the citizen as a member of a political party.
4. The grounds for encouragement.

[1] These lectures were delivered at Yale University, May 13, 14, 20, and 21, 1907, under the William Earl Dodge Foundation, and were published and copyrighted by the Yale University Press in that year under the title "The Citizen's Part in Government." The editors acknowledge the courtesy of the Yale University Press in permitting their republication, and take this method of expressing their appreciation.

THE CITIZEN'S PART IN GOVERNMENT

I

THE TASK INHERITED OR ASSUMED BY MEMBERS OF THE GOVERNING BODY IN A DEMOCRACY

A LARGE part of mankind still regards government as something quite apart from the main business of life — something which is undoubtedly necessary to enable them to attend to their business, but only incidental or accessory to it. They plow and sow and harvest; they manufacture and buy and sell; they practice the professions and the arts; they write and preach; they work and they play, under a subconscious impression that government is something outside all this real business — a function to be performed by some one else with whom they have little or no concern, as the janitor of an apartment house, whom somebody or other has hired to keep out thieves and keep the furnace running. In reality, government is an essential part in every act of all this wide range of human activity. If it is bad, ruin comes to all; if it is good, success comes according to capacity and courage. The fairest and most fertile parts of the earth have been for centuries wilderness and desert because of bad government; not only lands capable of supporting multitudes in comfort and prosperity, but lands that have actually done so in the past, are today filled with wretchedness and squalor, with ignorance and vice, because of bad government; while under good government industry and comfort flourish on the most sterile soil and under the most rigorous climate.

The proportional part played by government in the personal affairs of every individual life is rapidly increasing. The crowding and complications, the inventions and improve-

ments and coöperation of modern life have enormously increased the dependence of men upon each other. A century ago the farmers, who made up the bulk of the people of the United States, were quite independent in their comparatively isolated lives and with their few wants. I can recall a picture drawn by one who remembered the life of that time upon a farm familiar to my childhood. He said:

> We had abundance of food and clothing; we raised our own wheat and corn, which were ground into flour and meal at a neighboring mill for a share of the grain; we raised all the beef and pork and vegetables that we required; we raised sheep and sheared them, and carded and spun and wove the cloth for our winter clothing; we raised flax and from it made our own linen; we dipped our own candles, which afforded sufficient artificial light for a life in which it was the rule to rise with daylight and go to bed when it was dark; we had milk from our own cows, eggs from our own fowls and abundant firewood from our own forest. We had everything we needed except money and we had little need for that; the chief occasion for its use was to pay the small taxes which were required each year. There was little money in the community and it was sometimes hard to get enough to meet the taxes.

Under such conditions, government might well have been regarded as an outside affair, of which the less people heard the better.

Compare such a life with that of a resident in one of the cities, in which a third of the population of the United States are now crowded together. The city family is dependent for every article of food and clothing upon the products of far-distant places. These products are supplied through great and complicated agencies of transportation, and for the most part have been prepared for use by a variety of distant mills and factories. The family depends upon fuel brought from distant coal mines; its light comes from gas and electrical plants over which it has no control; the habits of business and social life are all adjusted to means of communication furnished by great telegraph and telephone companies and a government postal service. It exercises no control at all

over the things that are absolutely necessary to its daily life. A strike in the coal mines, like that which occurred in Pennsylvania five years ago, may at any time put out not only the furnace but the kitchen fire; a strike in the lighting plants, like that which happened in Paris a few weeks ago, may plunge the house and the neighborhood into darkness. A quarrel between railroad companies and their employees, or the inability of a railroad company to furnish sufficient transportation, may cut off the most necessary supplies; the meat is liable to be diseased unless some one inspects the packing-house, the name and place of which no one in the family knows. The milk may be full of tuberculosis and the water full of typhoid germs unless some one has tested the cattle and some one enforced sanitary ordinances upon distant farms. Access to the house depends upon a street department, safety from thieves upon a police force, and freedom from pestilence upon the sanitary disposal of the sewage of thousands of other families. Under these circumstances of complete interdependence, the individual is entirely helpless. The only way in which he can compel the continuance of conditions under which he and his family can go on living is by combination with others equally dependent with himself, and by organization for whatever control over those conditions is necessary. That combination and organization is government.

Men may leave all this part of the business of life to others and treat it as no concern of theirs; men may voluntarily elect to play no part in the control of the affairs which make up their daily life and to play no part in the working out of the great questions upon which the prosperity of their country, the future of their children, and the welfare of the race depend; but they need not flatter themselves that these things are matters apart from them, or that they are leading free and independent lives. Abstention is impossible under

the conditions of modern life and modern popular government. Men must either govern or be governed; they must take part in the control of their own lives, or they must lead subject lives, helplessly dependent in the little things and great things of life upon the will and power of others.

The theory and practice of government have vastly changed within the past few centuries and especially within the last century and a half. Control by superior authority, claiming by divine right, selected by inheritance, and supported by a comparatively small governing class selected in the same way was repressive and directive. Government was then apart from the main and general activities of life, but it was apart from them by being above them, by exercising rights over them and making them all pay tribute. Under our modern systems of popular government the repressive function still continues, but entirely new and different modes of action have been developed. The repression is self-repression, and the direction is the resultant of internal forces determining the character of the directed mass. Popular government is organized self-control — organized capacity for the development of the race. It is the good and noble impulses and the selfish and cruel passions of man struggling with each other for the maintenance or the denial of justice; it is the lust for power and savage instinct for oppression struggling against manhood and self-respect for the maintenance or destruction of liberty; it is the greed and cunning that have shamed the history of the world struggling with honesty and virtue for public purity; it is the longing in the heart of man for better things up through education to broader knowledge and higher life; it is the vast elemental forces of humanity moving great masses of men in violent protest against the ills of life, to the destruction of social order; it is the instinct of self-preservation which rallies other multitudes in defense of vested

interests and traditional rights; it is the dreams of Utopia to be realized by changing everything and the reverence for the past that is horrified by changing anything. These tremendous forces express themselves in laws, in the enforcement of laws, in contempt for laws, in good administration and bad administration, in sudden outbursts of feeling altering the surface of things, and in gradual movements affecting the whole relation of nations toward the ideals of peace and order and justice and righteousness. Upon them and the results they work out depend the prosperity, and honor and life of nations, and the future of civilization; and upon them depends the value of every farm and factory and shop, of every bond and share of stock, the peaceful prosperity of every home, the opportunities for success of every child.

Heavy responsibilities were assumed and serious dangers were confronted in departing from the theory that government must come from above, that the selfishness and cruelty and lust of mankind can be successfully controlled only by a class of superior men, by a small number of specially qualified experts in the art of government bred to power and trained in its exercise; and in adopting the idea that the great masses of men, who had always been subject to repression, control, and direction, could be trusted to govern themselves without any superior control; that by a process of evolution, through education and practice, the popular mass would acquire the self-restraint, the soberness of judgment, the loyalty to the fundamental principles of justice and liberty necessary to stable and effective government. The new departure was regarded by many of the wisest and best of mankind with the most gloomy forebodings. There was widespread belief that when political power was vested in the poor they would promptly proceed to divide among themselves the property of the rich, and that the control of democracy would prove to be the tyranny of the mob — the

most frightful form of oppression mankind has yet known. Jack Cade and Wat Tyler rebellions, peasant insurrections, the Red Terror of the French Revolution, the excesses of the Commune of Paris, the reign of assassination in Russia, the Jacquerie in Roumania, the perpetual revolutions of undeveloped Latin-America, have seemed to give color to these anticipations.

We have been accustomed to flatter ourselves that the great American experiment has been successful. It has indeed carried the demonstration of popular capacity of the people to rule themselves far beyond the point which originally seemed possible to the enemies of popular government. That demonstration has produced an effect upon the constitution of government throughout the civilized world by the side of which the Roman dominion sinks to an inferior place as a permanent force. Under its influence the whole continent of South America took heart and gathered courage to throw off the hard colonial yoke which held its people under the subjection of the Iberian Peninsula, and, passing through the storms of internal strife and continual revolution, is gradually emerging into a condition of peaceful industrialism. Its influence reacted upon France and requited her assistance in the cause of our independence, by furnishing proof of the possibilities of humanity to her political philosophers. It inspired the hope that led to the tempestuous revolt against the French Monarchy, which, through many vicissitudes, has resulted in the French Republic, now for more than a third of a century stable in its peaceful sway. Its example reacted upon England in the series of reforms which began with the Reform Bill of 1832 and enabled that conservative people to impress upon their ancient monarchy the essentials of a real government by the people, in which justice and liberty are preserved in a very high degree.

The fact that for more than a century peaceful industry, respect for law, and individual freedom have been maintained under popular government in the United States, and that they have been accompanied by extraordinary material prosperity, has fostered a tendency toward popular government in every country of Europe.

Nevertheless, we must not delude ourselves with the idea that the American experiment in government is ended or that our task is accomplished. Our political system has proved successful under simple conditions. It still remains to be seen how it will stand the strain of the vast complication of life upon which we are now entering.

Notwithstanding the change in the source of power, which has been the fundamental fact in the development of popular government, that government has proceeded hitherto with much respect for inherited governmental traditions and methods. The old machinery for the application of governmental power to the life of the community has been in a great measure preserved. Legislative bodies have made laws, and courts have sat in judgment under them and executives have enforced them, under authority derived from the people, very much as they did under authority derived from a superior power, except that the spirit has been different and the responsibility has been different. It remains to be seen whether democracies will be willing to continue these methods of government, or whether, with their continually increasing realization of their own power, they will change the old methods of government along such lines as are foreshadowed by the proposals for the initiative and the referendum — proposals that would substitute direct democratic action for representative government, as representative government was substituted for absolute monarchical control; and it remains to be seen what the effect of that kind of government would be.

Notwithstanding the great change at the top involved in the setting aside of monarchical and aristocratic government in modern republics, the substance of the old social system, with its respect for the rights of private property, has been preserved. Modern democracy has simply engrafted upon that system an assertion of the right of equal individual opportunity, so that no barrier of birth or caste or privilege shall stand between any man and whatever career his ability and industry and courage entitle him to achieve. The very basis of that social system is now widely questioned. Socialists, in no negligible numbers, demand a reorganization of society upon entirely different principles; limitations upon the right of private property are widely favored; and limitations upon individual opportunity are still more widely enforced among all that part of the wage-workers who believe in putting a limit upon the amount of work which each workman shall be permitted to do in his day's labor, so that the most industrious, skillful, and ambitious workman shall be permitted to do no more and to earn no more than the most dull, idle, and indifferent workman. A common benefit of property and a common standard of exertion are liable to be substituted for all inequalities of fortune and achievement. After many centuries of struggle for the right of equality there is some reason to think that mankind is now entering upon a struggle for the right of inequality. It remains to be seen how democracy will work under these new conditions.

One thing we have learned during the experience of popular government is that the progress of the world has carried civilized people to a point where we are not now voluntarily trying the experiment of government by self-control, but where society must rely upon that and cannot possibly go back to the old method of keeping peace by force or the threat of force. The complication and interdependence of

life puts the power of doing incalculable harm in the hands of so many men and combinations of men in different occupations that a realization of common interest is absolutely essential to the working of the vast machine. The mere forcible enforcement of law is quite inadequate. It is not fear of the policeman or the sheriff that keeps the peace in our many cities; it is the self-control of the millions of inhabitants enabling them to conform their lives to the rules of conduct necessary to the common interest; it is only against the exceptional lawbreaker, and criminals who are comparatively few in number, that the policeman and sheriff are effective.

Another thing we have learned is that it is possible for men to set up abstract and impersonal standards of right conduct, such as the great rules of right embodied in our constitutions, and that, although each man in his own personal affairs tends to depart from the standard and struggle against its application to himself, the general agreement of all who do not at the time happen to have any adverse interest is competent to maintain the standard in force and effect; so that all men may give their adherence and support to standards of conduct ethically superior to the course which the vast majority of them desire to take in their own affairs.

Another lesson the experience of popular government has already made plain is that the art of self-government does not come to men by nature. It has to be learned; facility in it has to be acquired by practice. The process is long and laborious; for it is not merely a matter of intellectual appreciation, but chiefly of development of character. At the base of all popular government lies individual self-control; and that requires both intelligence, so that the true relation of things may be perceived, and also the moral qualities which make possible patience, kindly consideration for

others, a willingness to do justice, a sense of honorable obligation, and capacity for loyalty to certain ideals. Men must be willing to sacrifice something of their own apparent individual interests for the larger interests of city, state, country; and without that willingness successful popular government is impossible. This loyalty to an abstract conception is a matter of growth. It is easy to trace its development in our own country from the time when local allegiance was predominant to the time when national allegiance has become predominant. Intense devotion to the state is one of the great elements of strength in the Japanese nation now; it was one of the chief elements in the growth of Roman power. It cannot be produced except by a long-continued habit of effort and sacrifice in a common interest. It is this gradually acquired loyalty to country more than anything else that enables men to exercise the self-control necessary to the subordination of the narrower personal interests to broader general interests, upon which self-government depends. The individual selfishness which fills men with a controlling desire for personal aggrandizement, to the exclusion of any consideration for the general good, marks a low stage in the political development of every country that has a history; and the bitterness of internal dissension which leads the adherents of particular opinions or interests to insist upon them at the cost of ruin and death to adherents of opposing views in the same country must in its turn give way to the conception of the higher loyalty before there can be really successful popular government. There must be both the habit of self-control and the dominating influence of the common ideal to enable men so to act together, subordinating minor differences of interest and opinion, as to make popular government possible.

The countries in which the people are continually engaged in internal quarrels never progress. History is full of such

examples. Some races appear to be incapable of combining in the support of a common political ideal beyond a certain point. The races that have this capacity to the highest degree persist and rule the world; the peoples that have it to a low degree lose their national entity and cease to govern. There are many countries now where controversy regarding matters of inferior importance is a present bar to progress. In every living nation the question always remains, How far has it capacity to go in that kind of combined action which subordinates individual interests, the interests of groups and localities and classes, to the general good of the country? That limit must be found in the capacity for development of the individual characters that make up the nation.

The Greeks appeared to be unable to maintain any effective combination beyond the individual city; the idea of a Hellenic country acquired no control over their lives. When the supreme moments were passed in which they united to repel the Persian invasions, they immediately fell apart and resumed their quarreling with each other. The Peloponnesian and Delian Confederacies, which might as well have been the foundations of a common country as the confederation of the American colonies, served merely as opportunities for the selfish advantage of Sparta and of Athens. So Greece, with all its glories of art and literature and oratory, went down before nations of inferior intellectual capacity — first the Macedonians and then the Romans. The long period during which internal strife has prevailed in the Latin-American countries has been an illustration of the struggle between the capacity for self-control in a common national interest and the forces of selfish individualism and factionalism. The major part of those countries are now happily emerging from the stage of militarism and the condition of continual revolution into the stage of industrialism

and stable government; but in some of them on the borders of the Caribbean the struggle is still waged and the result is in doubt. The discord between the thirteen American states and the practical paralysis of the Continental Government before the Constitution of 1787 illustrates the failure to attain this necessary condition; and the union of the same states under the Constitution illustrates success. The downfall of the once powerful Kingdom of Poland illustrates the triumph of those discordant motives which make successful government impossible. United Italy and Germany; the stability which the French Republic has maintained for a third of a century after so long a period of tumult and discord; the unbroken bonds that unite Great Britain with her colonies; and the permanence of the American Union, mark the great advances of which civilized men generally have proved themselves capable, in applying the principles of combination for a common national interest. No one can tell, however, when or where the great new forces which are being developed in the course of government by the people, and especially in the relations between industrial and social changes and the political constitution of government, will overcome the power of common and patriotic purpose that makes possible combined national action

Our country is not safe in leaving unused any possible influence and effort toward the maintenance and growth of patriotic idealism and practical loyalty.

There are probably few readers of history who do not ask themselves the question whether the civilization of our time is to pass through its cycle of development and decay, yield to the disintegrating passions of human nature, and leave the world to begin the process again as it has so often done. Is the New Zealander indeed to stand on the ruins of London Bridge? The question that Macaulay asks still remains to be answered:

Is it possible that in the bosom of civilization itself may be engendered the malady which shall destroy it? Is it possible that institutions may be established which, without the help of earthquake, of famine, of pestilence, or of the foreign sword, may undo the work of so many ages of wisdom and glory, and gradually sweep away taste, literature, science, commerce, manufactures, everything but the rude arts necessary to the support of animal life? Is it possible that, in two or three hundred years, a few lean and half-naked fishermen may divide with owls and foxes the ruins of the greatest European cities — may wash their nets amidst the relics of her gigantic docks, and build their huts out of the capitals of her stately cathedrals? [1]

Is some future poet to sing of us that "the lion and the lizard keep the courts where Jamshýd gloried and drank deep"? If not, I think the difference must be found in the fact that popular government carries our civilization down to the foundations of society and spreads it so widely over the surface of the earth. Former civilizations were but islands surrounded by vast regions where savagery ruled; and they were but civilizations at the top, underlaid by the ignorance and prejudice of a multitude who had no interest in preserving what such civilization had gained, no capacity to appreciate its merits, and but little contribution to make toward its increase. They were the civilizations of privileged classes, which always tend toward degeneration. The hope for the permanence of modern civilization is that it is being built up from the bottom through the participation of the whole people in that universal, combined action for the common good which we call popular government.

It may seem that I have ascribed a part to government which properly belongs to the development of morals and the spread of education; but I think a little reflection will show that this is not so. Morals do not develop in the abstract, but in the gradual adaptation of conduct to rules already intellectually accepted. The conduct to be adapted is conduct toward other real living beings. Even in the

[1] Mill's *Essay on Government.* Macaulay in *Edinburgh Review,* 1829.

purely personal relations government plays a leading part in directing conduct, as in the changing rules of law regarding the rights and duties of owner and slave, master and servant, employer and laborer, parent and child, guardian and ward; but in the great field of the relations of men to each other in the mass the whole development of morals practically is governmental. The words liberty, justice, order, peace, protection of the weak, public purity, public spirit, denote the application of certain moral ideas to the conduct of men in mass toward their fellow-men. The tremendous power of a people become sovereign and the helpless dependence of modern men upon each other make this phase of development of morals of primary and vital importance. It is the conversion of moral rules into political conduct that concerns government, and that is a process of practical experimental life working out results acceptable to a majority and then enforced by them upon the minority. This process is not much furthered by mere insistence upon the rules, or by academic discussion of them, for in successive generations the same accepted moral rules are translated into entirely different conduct, and it is the translation which is of vital importance.

If we turn to education, we find that instead of this being a thing apart, the education which enables the great body of democracy to work out the problems I have described — the primary education, which opens the door of knowledge to the mass and the door of unlimited opportunity to the exceptional intelligence — is almost universally supplied by government as a part of the political qualification for citizenship. On the other hand, it is very doubtful whether the higher academic education contributes much to capacity for political usefulness. As a rule, political wisdom, in the best sense, comes in life and not in study, and the tendency of highly educated men to neglect all political duties is unfor-

tunately too general. It is the process of government that educates for government. It is experience and observation of the working of laws and political practices and injurious customs that point the way to intelligent legislation. The factory inspectors in the state of New York inspected over thirty-eight thousand separate factories last year. Those inspections and the reports and the discussions on them are education through which the thirty-eight thousand employers and the million and odd employees and the community which controls them both, may come to a sense of just how the balance ought to be held between the employer's rights of property and free contract, on one hand, and the employee's freedom from the slavery of circumstance, and the state's right to have normal, healthy citizens, on the other.

The greatest, most useful educational process ever known in the world occurs every four years in the United States when, during a presidential election, some fifteen million voters are engaged for months in reading and hearing about great and difficult questions of government, in studying them, in considering, and discussing, and forming matured opinions about them. We sometimes hear complaints that elections interfere with business and come too frequently. On the contrary, nothing else is so valuable and important for business, because it is this educational process that is laying the solid foundation of sound judgment, sober self-restraint, and familiarity with political questions among the governing mass, upon which the security of all business depends.

Doubtless there have been abuses in raising and applying campaign funds; but, in the main, there is no more useful expenditure of money from the public point of view than this, which in the last presidential election, according to official statements, amounted to only about three and a half

cents per capita for the people of the United States, on one side, and probably somewhat less on the other; for the great bulk of it is applied to the political education of voters.

Everything that I have said about the relations of government to our modern life — the character of popular government, its difficulties, its dangers, its possibilities, its mode of life and growth — carries, as a necessary corollary, the existence of a universal duty of citizenship to take part in it. It is not rightly a matter of choice whether a man shall trouble himself about affairs of government in his community, or confine himself to his business, his profession, or his pleasures, and leave others to govern; it is a matter of peremptory obligation which cannot be avoided by any intelligent man who has any understanding of the conditions under which he lives. A French nobleman could attend the court of Louis XIV, or retire to his castle, as he chose, without discredit; for under that system of government the question was whether certain men or certain other men conducted the government. The essential feature of the present condition is that the burden and duty of government rest upon all men, and no man can retire to his business or his pleasures and ignore his right to share in government without shirking a duty. The experiment of popular government cannot be successful unless the citizens of a country generally take part in the government. There is no man free from the responsibility; that responsibility is exactly proportioned to each man's capacity — to his education, to his experience in life, to his disinterestedness, to his capacity for leadership — in brief, to his equipment for effective action in the great struggle that is continually going on to determine the preponderance of good and bad forces in government, and upon the issue of which depend results so momentous to himself, his family, his children, his country, and mankind. The selfish men who have special interests to subserve are going

to take part; the bitter and malevolent and prejudiced men whose hearts are filled with hatred are going to take part; the corrupt men who want to make something out of government are going to take part; the demagogues who wish to attain place and power through pandering to the prejudices of their fellows are going to take part. The forces of unselfishness, of self-control, of justice, of public spirit, public honesty, love of country, are set over against them; and those forces need every possible contribution of personality and power among men, or they will go down in the irrepressible conflict. The scheme of popular government upon which so much depends cannot be worked successfully unless the great body of such men as are now in this room do their share; and no one of us can fail to do his share without forfeiting something of his title to self-respect.

II

THE FUNCTION OF POLITICAL PARTIES AS AGENCIES OF THE GOVERNING BODY

We have now reached a point where the question is naturally suggested: How should the citizen take part in the government of his country? Given a young American who has just completed his academic training and is about to begin his active life, and who wishes to do his full duty as a citizen in maintaining and improving his government: where is he to begin and what is he to do?

On the threshold of the answer to this question we must determine that the duty will not be fulfilled merely by playing the rôle of a critical observer of what others do. It is indeed important that there should be criticism; no public officer can afford to be relieved from it. Every man in the performance of public duty tends to lose his sense of proportion by seeing things from only one point of view, and tends to devote himself unduly to some phases of his work, which preoccupy his mind, so that he neglects other things which ought to have his attention. Every one makes mistakes, and the sooner he is told of them the better; and every one who is obliged to withstand the pressure which conflicting interests bring to bear upon the performance of his duty finds in the certainty of criticism a powerful incentive to be sure that his action is such that he can defend it afterwards according to his own convictions of right. Criticism tests and corrects the opinions and the practices of the men who are doing the work of the world.

Nevertheless, to criticise is not to do the work. The preservation and development of civilization require affirmative forces; the real work of life is constructive; criticism is destructive.

It is, moreover, true that the most valuable criticism comes from the men who are also undertaking to do things themselves. Criticism always involves comparison with some standard assumed in the critic's mind; and the value of the criticism depends largely on the conformity of that standard to the real conditions under which the work criticised is done. The critic of government who is himself trying to do his share of the affirmative work of government is in the way of learning something of the evils against which other men engaged in government are struggling, the difficulties they have to overcome, the means they have at their command with which to overcome those difficulties, and the real as distinguished from the apparent value of what they do. Criticism from such a source is a real benefit. The mere critic of government, however, who does not himself attend to his share in the affirmative work of government, ordinarily adopts standards of comparison which ignore the most important elements of truth, and he is quite likely to do more harm than good; he gradually assumes an attitude purely destructive and acquires a habit of simple fault-finding. Such a man is generally a hindrance rather than a help to the work of good government.

It is equally plain that for most men preaching to others about what they ought to do is not a very effective way of helping along the work of government. Mankind does not pay much attention to people who talk down at them from without about their duties, unless the instruction comes from some one who is already recognized by his own performance as having acquired the right to be considered a teacher. Occasionally a man has some message to deliver of such weight and cogency as to impress itself upon many other minds; but such men are very rare and very far removed from the ordinary run of men. If any one can express as much wisdom as President Eliot has put into some of his

addresses, or can write such a book as President Hadley's *Freedom and Responsibility*, or such a book as James Bryce's *American Commonwealth*, or John Morley's *Life of Gladstone*, or can compose such orations as Edmund Burke's, he can make a real contribution to the science, and therefore to the practice, of government. But for the generality of us whose knowledge and insight are not much, if any, superior to those of the great body of our fellows, it is wise to wait until we have at least greater experience than they have in the things we undertake to talk about, before we try to play the schoolmaster to them.

There are many people whose idea of duty is to assign duties to others, but for the most part their efforts are a mere waste of words. Mr. Murat Halstead once told me how, being a young newspaper correspondent during the Civil War, he had felt moved to write a long letter to Secretary Stanton, giving his view about the matters in which the Secretary was engaged, and how, many years afterwards, this letter was found on the files of the War Department indorsed, in Stanton's own handwriting, "M. Halstead — Tells how the war ought to be carried on." At the time of our conversation, a long and ripe experience had taught the veteran journalist the true character of his youthful undertaking; and he remarked that this indorsement was the only evidence he had ever known that Stanton possessed real humor. The world is full of men ready to tell how the war ought to be carried on by others; but the war goes on just the same, and the men who bear the burden and heat of the struggle in actual service accomplish the results, and their self-constituted and little-qualified advisers have really no substantial part in the business.

It is plain that the true way to begin an active part in the affairs of government is not by being elected or appointed to office; that should always be a result rather than a beginning

of interest, activity, experience, and proved capacity in the affairs of government. This is especially true of the greater offices. As to the smaller offices, especially those which occupy the entire time of the officer, it is often very undesirable for a young man of education and good parts to abandon his profession or business or whatever calling he would naturally follow to fill one of them. There are very few public offices in comparison with the number of citizens, and at the best only a very small part of the young men of the country could enter into active governmental work by holding them.

Of course, voting is a fundamental and essential part of the qualified citizen's duty to the government of his country. The man who does not think it worth while to exercise his right to vote for public officers, and on such public questions as are submitted to the voters, is strangely ignorant of the real basis of all the prosperity that he has or hopes for, and of the real duty which rests upon him as a matter of elementary morals; while the man who will not take the trouble to vote is a poor-spirited fellow, willing to live on the labors of others and to shirk the honorable obligation to do his share in return.

Merely voting, however, is a very small part of the political activity necessary to popular government. An election is only the final step of a long process by which the character of government is determined. The election records the result of the process; the real work of government is in the process.

The voter ordinarily has merely a choice between two or three candidates for an office, no one of whom may be the man whom he would prefer for the office; or he has the opportunity to say yes or no to some question framed in advance, and very likely framed in such a way that neither yes nor no would represent his real opinion upon the subject or

lead to what he would regard as a satisfactory result. Of course our election laws preserve the theoretical right of each voter to cast his vote for any one whom he chooses; but we all know that if the voter exercises that right for some one other than a foreordained candidate his ballot goes into the category of scattering votes and is practically thrown away. The same thing which is true as to the limitation of the voter to particular candidates is true also of the issues or opinions those candidates are supposed to represent. The issues are all made up before the voter goes to the polls. You and I may feel a desire to express an opinion by our ballots on the revision of the tariff, or on free trade and protection, or on the regulation of railroads, or on the prevention of trusts, or on the method of taxation, or on economy and honesty of administration, or on the currency and banking system, or on the control of insurance companies, or on the powers of corporations, or on the open shop, or on the foreign policy of the country; but when we go to the polls merely as voters we are entirely helpless as to determining upon what question our votes will count, and ordinarily as to which way they will count upon many of the questions in which we are interested. The questions on one side or the other of which our votes will weigh, have all been selected and brought into prominence long before the election. The result of this is to limit the effect of our votes to certain narrow channels. The issues as finally framed may not be those we think most important, and the relation of the candidates to them may be such that we cannot help one cause by our vote without hurting another in which we are equally interested. The men who are elected to office give practical effect when in office to the results of that previous process recorded in the canvass of votes. Thus, the chief work of popular government is to be found in the process which results in the vote.

Under our present political system in the United States and at our present stage of political development, that process is mainly carried on through the organizations known as political parties.

Manifestly, there must be organization; there must be some means by which the vast number of questions which arise in relation to government in our complicated modern life shall be simplified; by which the questions that are vital shall be separated from the comparatively unimportant questions and the people who tend to think alike upon the vital questions may have an opportunity to make their votes effective by voting alike; by which, from the vast number of men who are available for selection to administer the powers of government, some may be indicated as the probable choice of a sufficient number of voters to give some chance of success in voting for them.

If you can imagine all the sixteen hundred thousand voters of the state of New York, for example, going to the polls on an election day with no previous concert of action, but each determined to vote for the best man — that is, each determined to vote for the man who of all his acquaintance seems to him the best to fill the position, or for the man whose opinion most closely agrees with his upon some subject which happens to be uppermost in his mind — what would be the result! what thousands of names would be found upon the ballots when they came to be counted! If a majority of voters were required to elect, of course there would never be an election. If only a plurality of votes were necessary to elect, the largest number of votes cast for any one man would inevitably be a very small proportion of the total of votes cast. It is highly probable that the great majority of the voters would have preferred that the man with the plurality should not be elected, and would have been quite ready to agree on some one else whom they all preferred to

him and considered but little less desirable than the various persons for whom they had cast their scattering ballots. The men elected in such a way would have no guide as to the principles, or policies, or rules of conduct which the majority of the voters wished them to follow in the offices to which they were elected.

Such a method of conducting popular government, however, is not merely futile, it is impossible; for human nature is such that long before such an election could be reached some men who wished for the offices would have taken steps to secure in advance the support of voters; some men who had business or property interests which they desired to have protected or promoted through the operation of government would have taken steps to secure support for candidates in their interest; and some men who were anxious to advance principles or policies that they considered to be for the good of the commonwealth, would have taken steps to secure support for candidates representing those principles and policies. All of these would have got their friends and supporters to help them, and in each group a temporary organization would have grown up for effective work in securing support. Under these circumstances, when the votes came to be cast, the candidates of some of these extempore organizations would inevitably have a plurality of votes, and the great mass of voters who did not follow any organized leadership would find that their ballots were practically thrown away by reason of being scattered about among a great number of candidates instead of being concentrated so as to be effective.

Under very simple social conditions, especially in the smaller governmental subdivisions such as towns and counties, and in some parts of the country where there are important questions involved in the local government and almost every one in the community is well known, so that

elections are largely a matter of personal choice, this kind of purely personal organization and effort often answers the purpose of enabling voters to concentrate their ballots effectively. Several well-known men may offer themselves publicly as candidates and each of them carry on, through a personal organization, a campaign for the suffrages of his fellow-citizens. In the governmental affairs of the country at large, however, and for the most part in the governmental affairs of the states, the opportunity for personal choice is very limited; it is impossible that any man should be really personally known to a very large proportion of the people in the United States, or even in any state. There are questions of government upon one side or the other of which the voters hold strong opinions; and men are known and are commended to the voters as candidates by the positions they have taken upon those questions, and, if they have already held office, by public report of the way in which they have performed their duties in carrying out certain policies or applying certain rules of conduct. Candidates, therefore, in these larger fields are regarded chiefly as the representatives of principles and policies, and so far as they are affected by personal popularity, that is chiefly based upon the effectiveness with which they have already represented those principles and policies.

These great governmental questions are not temporary and special to particular elections. There are some questions of policy which are never settled permanently, because new conditions are always arising to serve as occasions for their reconsideration. For example, the subject of a protective tariff has furnished questions upon which the people of the United States have divided for a century, and probably will divide for an indefinite time to come. These tariff questions reappear in one form or another at every national election when they do not happen to be for the moment thrust aside

by some other special and absorbing issue. The fact that the people have decided in favor of a high tariff at one time, or for a low tariff at another time, has no effect whatever to prevent the same old battle being fought over and over again.

Series of questions relating to the extension of slavery, merging into the questions relating to the continuance of the war for the Union, and these merging again into the questions relating to the results of the war and the political and economic status of former slaves, have continued from the beginning of the nineteenth century to the beginning of the twentieth. In the same way a long dividing line may be seen separating people of different ways of thinking upon questions relating to the currency. In one form or another, for a long series of years, the controversy has been waged between the advocates of currency based upon a gold value, on the one hand, and the advocates of a currency based upon the idea that the Government can give it value in the form of greenbacks or depreciated silver, on the other.

There are certain distinct and fundamentally opposed schools of thought and opinion which range portions of the people on different sides of many questions through long series of years. For example, the people of the United States during most of our national existence have been divided between the advocates of a strict construction and the advocates of a liberal construction of the Constitution. One would confine the powers of the National Government within the narrowest possible limits; the other would find in the Constitution all the powers that any nation can have except as they are expressly limited by the terms of the Constitution. One tends to carry the independence of local self-government to an extreme; the other tends to carry the centralization of national government to an extreme. This fundamental difference of view has divided the people of the country in

a long series of successive elections upon many specific and important questions; upon the power of the National Government to carry on internal improvements; to restrict the extension of slavery; to establish a national bank; to charter Pacific railroads; to maintain a tariff for protection as distinguished from a tariff for revenue only; to acquire and incorporate in the United States additional territory; to acquire and govern so-called colonial possessions; upon the extent of the power to regulate commerce, of the taxing power, of the police power, of the treaty-making power.

It is true that in recent years some professed disciples of Jefferson have advocated measures of national control which would have led that apostle of the least government possible to regard Hamilton as a strict constructionist; but these are probably temporary aberrations. The same division between the two schools of interpretation of the Constitution still exists and in the nature of things must continue.

With these continuing questions and permanently divided schools of opinion the association of the advocates of each opposing view is bound to be repeated in many successive political campaigns. This association is not occasional and fortuitous; it is, to a great extent, predetermined and customary. The men who entertain positive views upon one side or the other of the great political questions become known; they acquire the habit of working together; they rely upon each other's coöperation. The association is practically continuous, because the process in which the advocates of these differing views are engaged is continuous. Our people are so constituted that no sooner is an election over and the result declared than the supporters of the defeated candidates and the advocates of the rejected views immediately begin their efforts to secure a reversal of the result at the next election. The ever-present consciousness that in a year, or two years, or four years there will be an opportu-

nity to substitute victory for defeat is a great element in the peaceable and good-natured acceptance of the results of our elections by those who are defeated. The very intensity of the minority's belief that its candidates and its policies are better than those which for the time being have a majority of the votes creates an expectation that when the test of performance is applied to the successful candidates and the test of application is applied to the accepted policies, their inferiority will be demonstrated, so that the public verdict will be reversed.

This continuous association and effort on the part of a great number of men for the accomplishment of a common purpose through a continuous series of political struggles of course involves continuous organization, for the work of a great number of men for a common purpose through a long period of time cannot be carried on at all without organization. These continuous, voluntary, organized associations to secure the adoption of policies upon which their members agree and the choice of officers who will represent those policies are what we call political parties.

As new issues arise under the changing needs and difficulties and desires which time brings to every community, they find these organizations already in existence, and if the new issues are such as to demand settlement or excite great interest among the voters it becomes immediately necessary for the existing political organizations to determine what positions they will assume upon the new questions. This determination is naturally based either upon the application of the general principles of government and the general ideas of policy which have controlled the respective parties, or upon an estimate of the support which one position or another will receive from the voters of the country, or upon a combination of the two. Sometimes the lines which separate the voters of the country upon one side or the other of a

new question run across lines of cleavage between the old parties, and the comparative importance of the new question is such that great bodies of voters dissolve their association with an old party and form a new association with another party; as, for example, the positions taken by the Democratic and Republican parties on the subject of the currency a few years ago led many gold Democrats to go over to the Republican party and many free-silver Republicans to go over to the Democratic party. Occasionally, the attitude of all existing parties is so unsatisfactory to the people much interested in a new question that they undertake to form a new party for the furtherance of their views on that particular question. Generally, these attempts show that the people who are interested by a particular new issue over-estimate its importance and their attempts to form a new party fail; but we have had one signal example the other way — in the formation of the Republican party in 1856 by the men who were not satisfied with the attitude of either the Democratic or the Whig party in regard to the extension of slavery. As a rule, however, each old political party adds to the list of principles and policies which it advocates a view upon each great new question in accordance with the opinions of a majority of its members, and, with some slight changes and realignment of dissatisfied members, old parties go on representing their membership upon the new questions as well as upon the old questions in reference to which their parties were organized. In time, as the original questions which led to the formation of a party disappear, the party continues with an organization representing its members no longer for the specific purposes which brought them together, but for the new purposes which they have agreed upon through the processes of their party organization and activity.

Many very good and public-spirited men have deplored the existence of parties, and some of them prefer to stand altogether aloof from political parties and to exercise their right to express their opinions by voice or pen or print, and to vote with entire personal independence and without being either trammeled or helped by the coöperation of others.

As I have tried to point out, however, political parties are the natural product of evolution in the process of popular government; they are not merely the best and most practical way in which the operations of popular government can be carried on, but they furnish the only way to carry on those operations so far as we can judge from the experience of the world up to this time. In no large country has any real popular government ever existed for any considerable time without them. They exist in England, France, Germany, Austria-Hungary, Italy, in all the constitutional governments of Europe, and in the Latin-American states, with variations depending upon the characters of the different peoples; and in every case they assume more definite form and more clearly recognized functions as the country progresses from the status of personal government to government of principle and policy. As popular government develops, in every case political parties develop, and in every case the longer the operations of popular government have continued and the more perfect is the expression of public opinion and will, the more highly developed in the true sense is political party organization.

It is, of course, highly important that the voters of a country should hold themselves at liberty to condemn by their votes any party with whose policy they do not agree, or which is false to its professions, or whose candidates for office are found to be unfit to represent truly the principles professed; nevertheless, the great mass of the people of the United States at every election go with one of the great

parties or the other, and the great mass of the voters of each party stay with their party election after election. They approach every election with a presumption in favor of the policies advocated by the party to which they have adhered in the past. As to the majority of them, that presumption is never overcome. Their minds are most receptive to arguments and persuasion coming from their own party associates and in favor of their own predilections. The habit of reliance upon party leaders; instinctive loyalty to old comrades in former political struggles; the natural reluctance to break old associations and form new ones; and often the predisposing effect of inherited opinions and youthful training — all combine to make men vote ordinarily with their party. This settled tendency makes the determinations reached in the councils of the great political parties the most important and dominating factors in determining the course of popular government, and renders participation in party action the most effective way to reach the mind and influence the action of the mass of voters. The great work of popular government is done in the associations and primaries and caucuses and conventions, in the conferences and discussions and canvassing and personal association, in the private meetings and public meetings, in the convention committees, in the drafting of platforms, in the struggles between candidates for nomination, in the efforts to educate and convince and persuade voters, and in all the great and complicated process which goes on incessantly within each party in every village and town and city and state, culminating in the submission of the work of the national convention to the voters of the country at large, and, upon one side or the other, determining the legislative and executive policies of the country.

I have no doubt that the American who feels the responsibilities of his citizenship can do his duty as a part of the governing people better by entering into the organization

of one of the great political parties than in any other way. The better educated, more intelligent and more active he is, the greater is the reason why he should seek for his powers the immense increase of effectiveness which comes from association, combination, and organization. There are many abuses of party power and in party management in the United States; but the American who stands apart and criticises or condemns the conduct of political parties may well be answered, "Yours was the responsibility and you have wholly failed to discharge it."

We sometimes hear it said by intelligent and educated men that there is no opportunity for them to do anything in party politics because the machine controls everything, and no one who is not in the machine has any chance — that is to say, that the men who for the time being hold the party offices will control the party action, and the voice of an individual new recruit in the party ranks would not exercise any control. This is wholly fallacious. There never is a party organization or a so-called machine which cannot at any time be turned out of power if the rank and file of the party choose to turn them out; and there never is a time when a man of character and ability entering into the active work of a party cannot gain in full measure the influence and power to which his ability entitles him, or cannot contribute materially to a change of control, provided he is willing to take the pains and give the time and effort necessary to the creation and exercise of influence among the members of the party. Of course a new recruit cannot step into a new association with a great number of people and immediately dictate what they are to do. Time and long-continued effort and long association, through which come confidence in a man's sincerity and respect for a man's opinions and a desire to comply with a man's wishes, are necessary to the exercise of that kind of power; but the same things are necessary to

the exercise of influence and power in any of the affairs of life which involve the conduct of others. If any American citizen is willing to make the same sacrifice of personal comfort and convenience and employ the same ordinary means to make himself an active force in politics which he would employ to make himself an active force in business, or in the church, or among the members of any profession, or in any kind of enterprise which involves the action of a large number of men, no party machine can prevent and ordinarily no party machine wishes to prevent him.

We often hear remarks made which indicate an impression that politicians are rather a low set of fellows, with selfish aims and corrupt practices, who manipulate party politics for their own advantage, and that the less self-respecting gentlemen have to do with them the better. If that is ever the case, and it undoubtedly is the case at some times and in some places, it is always because at such times and in such places political control is allowed to go by default. Such a condition of political affairs is always due to the fact that the citizens who are honest, upright, and public-spirited, who would not prostitute party power to personal advantage, who would not make a party organization a corrupt combination to secure place and profit, fail in the performance of their public duty and permit the party organization which limits and restrains the exercise of their political powers to remain in the hands of unworthy and self-seeking men. There is no party in which the great body of the voters desire that kind of control, and it cannot exist unless the voters of the party, and the citizens who ought to be active in exercising the powers of the party, fail through indifference and unwillingness to spend the necessary time and take the necessary trouble to exercise the powers that lie within their reach. I have said that there are serious evils incident to the management of our political parties, and some of these I shall

presently mention; but they are all evils which would be readily remedied if the citizens generally who are in agreement upon the principles of the respective parties would recognize their responsibility and perform the political duties which rest upon them as citizens. The fact that such evils exist, instead of being a reason for not engaging in party activity, is a reason for engaging in it. Such a fact presents a clear and imperative duty to remedy the evil; and that duty rests not merely upon the men who already have membership in the party, but upon all men who agree in general with the principles of the party, and who therefore ought to look upon the party officials and managers as their agents and to hold themselves responsible for their agents' character and conduct.

Another reason or excuse for not taking part in political affairs is the direct reverse of those that I have mentioned: it is that party management is satisfactory; that matters go along very well, and that a man does his duty to his party if he supports its ticket with his vote and perhaps contributes his fair share toward the payment of its expenses. This position can never be maintained. It means, in the first place, that the man who takes it is willing to have the greater part of his duty as a self-governing citizen done for him by others, and it means also that the power and efficiency of the party in working out the problems of government and in advocating and enforcing the conclusions which it reaches are reduced by the desertion of one of its elements of power — that is to say, the ability and force of character of a part of the men who ought to be engaged in its work.

None of these reasons for not taking part in party politics is ordinarily the real reason. The real reason is that men are unwilling to spend the time and the money and the labor necessary for the due performance of their duties as citizens; that they prefer to attend to their professions, their business,

their pleasures, and allow others to govern them rather than to take part in governing themselves; that they are willing to permit the great struggle which is continually proceeding for the preservation and protection of their property, their liberty, their opportunities, for sound principles of finance, for the preservation of society, for the correction of social and political and business evils, for the punishment of wrong-doing, for the furtherance of justice and the maintenance of peace and righteousness, to go on without any help from them. They are willing to let the great mass of men upon whose education and clear and reasonable understanding of governmental questions the whole structure of free government depends go without any help from their education and intelligence. They are willing to pursue a course which, if shared in by the rest of their countrymen, would bring our constitutional government to an immediate end, wreck our prosperity, and stop our progress. They are willing to depend, for the continuance of everything they have of value in life, upon their confidence that others will be more public-spirited and unselfish and willing to take trouble in performing their public duties as citizens than they are themselves.

III

THE DUTIES OF THE CITIZEN AS A MEMBER OF A POLITICAL PARTY

It is quite simple and easy for any intelligent young man to take part in the activities of a political party in the United States. He has only to select the party the ascendancy of which he considers most desirable, and let the recognized party officials of his own home know that he is willing to work. He will promptly find himself admitted to membership in whatever may be the simplest form of political organization or association in the locality, and will find himself provided with plenty of work to do. He cannot begin by leadership or by dictating party policies, and he probably cannot assume in the beginning any such position of superiority as he may think his education and intelligence entitle him to have. The work in which he will be engaged at first may be simply the details of local organizations, which will perhaps seem of little consequence; or engaging in struggles between candidates for small offices, in which he does not take very much interest; or canvassing from house to house to ascertain the political affiliations or preference of the residents. It may be very far from that advocacy of principles and influence upon the policies and direction of government in which he would like to engage. He may, however, be sure that he will ultimately find the exact level and rise to the full height of opportunity and influence and dignity of employment to which his abilities, character, and devotion to his duties entitle him. If he is able and willing to render effective service, he will gradually find himself moving along until he is at last engaged in the most important duties on the broadest fields of political action. In the meantime, or if he should never rise above mere local activity, let him

remember that the first and chief duty of citizenship is to serve in the ranks — not to await some great and glorious occasion to win fame and power. It is the active service of the men in the ranks that makes the difference between popular self-government and popular submission to an absolute monarch. Without the great body of workers who never rise to leadership popular government would be as impossible as a successful army composed entirely of officers.

In the performance of the simple duties of the political beginner there are certain principles of conduct so indispensable to usefulness that observance of them is a clear duty.

Men influence the conduct of others chiefly through personal association and intercourse. There is such a preponderance of good in human nature that association with men ordinarily begets a liking for them. As men come to know each other each comes to receive from the others the respect and confidence to which he is entitled; his character and his opinions insensibly acquire their due weight and influence. It is not the stranger who says, "Go there," or "Do that," who is obeyed; but it is the old acquaintance who says, "Come with me," or "Let us do thus and so," who is followed. The knowledge of the tendencies and prejudices of men acquired through personal acquaintance makes the suggestion of a wish from a friend often of greater weight than the most eloquent speech or the most profound essay from a stranger. This power of association is the chief thing which enables political organizations, even when they are going wrong or in bad hands, to resist attacks from without, even from best and most highly respected citizens, when these occasionally and for the moment are moved to instruct the men actually engaged in political affairs as to what they should and should not do.

There is no monopoly of this power of association. Unselfish and public-spirited men can qualify themselves to

exercise it if they take the trouble, just as well as self-seeking men of low aims.

To accomplish very much with other men one must have a considerable degree of sympathy with their feelings and interests. The man who never cares or thinks about anything but himself cannot expect anybody to think or care about him. If he has no interest in the hopes and ambitions of others, no consideration for their sensibilities, they will be equally indifferent so far as he is concerned. Political bodies, especially primary political bodies, are made up, to a degree unequaled in any other association, of men of widely varying conditions in life, with different opportunities for knowledge and capacity for reflection, with different prejudices and ways of thinking, differing widely in information, in previous reflection, in breadth and scope of thought, in motives, in characters, in tempers, in ambitions. Each one of them is entitled equally with all the others to have his opinions, his wishes, and his ambitions considered; and the feeling that any one gives kindly consideration to them is in itself a great source of influence. The man who has never had anything above a day's wages or a small clerk's salary, or who perhaps has no income but is looking for one, is just as much entitled to aspire to a place in the custom-house, or to a post office, or to be a letter-carrier, as the very successful and able man distinguished in his community, is entitled to aspire to be governor or senator; and the small man is just as much entitled as the big man is to have his aspiration considered and treated as an honorable aspiration. The small trader who hopes that the legislation and administration of government will be such as to promote the prosperity of his little business is just as much within his rights as the great banker who hopes for currency legislation or the great manufacturer who hopes for tariff legislation beneficial to his business. Sympathetic recognition of such considerations

is a natural and necessary basis for influence and leadership among political associates.

A rightly constituted man brought into association with a great number of others cannot fail to acquire some degree of proper humility. It matters not how well educated or intelligent a man may be, the combined experience, knowledge of life, range of thought, fertility of suggestion, thoroughness of criticism, to be found in any great body of men taken together are so far beyond him that he is bound gradually to take an attitude of receiving and learning as well as endeavoring to instruct and lead. He will thus escape from the fatal attitude which ruins one's influence with others by giving an impression of assumed superiority in wisdom or virtue.

In order to secure united and successful action for any purpose the members of a political party must learn to subordinate minor differences in order to combine for the advocacy and promotion of more important matters in which they agree. That is essential to the maintenance of any political organization, as indeed it is essential to successful combination in all human affairs. The concerted action of many men of different interests, impulses, opinions, and desires is essential to the accomplishment of any result under popular government; and that concerted action cannot be attained except by continual and mutual compromises. There is no quality in a people more important for success in popular self-government than that practical common sense which makes them capable of such practical compromises; and every one engaged in political affairs is under a duty to make such fair concessions from his opinions and desires as may reasonably contribute toward bringing out practical and effective results in common action. Of course this does not mean to compromise character. Every man, however, should be careful not to deceive himself into supposing that

to be a matter of conscience which is really only a matter of pride of opinion, or determination to have one's own way.

In politics, as in everything else, a man ought to be thinking about his work and not about what he is going to get out of it; to be intent on succeeding in his undertakings rather than upon the appearance that he is making or the credit that he is going to receive. That is an essential condition to success in all the arts which deal with human nature as their material. I have often noticed at the bar that the advocate who is thinking about making a fine speech never makes a lodgment in the mind of either the court or the jury; they may admire the speech, but they are neither convinced nor persuaded. This is true at the bar, in the pulpit, and in the lecture room. It is equally true of literary style; all obtrusively fine writing is ineffective. And this is true in politics. I do not mean to insist upon an impracticable altruism, or to exclude an honorable ambition to succeed and to have the reward of good, effective work, which comes from the favorable opinion of one's fellows and a general recognition of one's service. Recognition and appreciation are properly gratifying to every one; but that should be a secondary object if a man is to do the best type of work. The primary object with every man should be to do the work that comes to his hands just as well and thoroughly as he possibly can do it; and there is one certain reward for work so done — in the satisfaction that the man himself feels in having done good work. Every man should rely for the appreciation and recognition of his service, not upon his own estimate of it, but upon the estimate of others; no man can properly judge of his own merit or the value of his service. It will often happen that particular things a man does may not receive from others the credit to which they are entitled; but it will also happen that he will get more credit than he is entitled to for other things that he does; and, in the long

run, every man may be sure that he will receive all the credit to which he is entitled without any attempt on his part to influence the judgment of others or to force upon them his own estimate of himself. The man who engages in political work with the primary idea of getting office may succeed in getting the office; but he is likely to lose what is of far greater value than any office — the good opinion of the community in which he lives — for the people of self-governing communities ordinarily possess a strangely unerring insight which detects the spirit in which such a man works and classifies him as a mere politician in the bad sense of the term and stigmatizes him as an office-seeker.

The career and influence of such a man, moreover, tend to promote the kind of political activity which is the most injurious and demoralizing in popular government.

It appears from what I have already said that there are three quite distinct stages in the development of self-government. The first and lowest is that in which the people of a country divide with sole reference to their partisanship for particular persons whom they desire to put into power. In its worst form this kind of partisanship is so completely exclusive of consideration for public good that the contest for personal ascendancy often merges into violence and civil war and continuous revolutionary attempts. This condition was once widely characteristic of Latin-American republics, and some of them are still at that low stage of development, although many of them and the most important have happily passed out of that stage and have come to regard the choosing of officers as the means of giving effect to policies rather than as being itself the object of popular government. Those countries have had one preëminently great and noble example.

José de San Martin was born in Argentina, served with distinction under the Spanish flag in the Napoleonic wars, and returned to his native land at a critical period of the

South American struggle for independence. Everywhere except in the United Provinces of the River Plate the early revolutionary efforts had been suppressed by Spain. The old vice-royalty of Peru, strong in its mountains, in its army, and its command of the sea, was the center of reactionary power. Impregnable there against attack, it seemed that Spain could choose her own time to sweep down over the old trade route by which the precious metals of Peru had found their way to the commerce of the Plate and to destroy all that was left of South American freedom. San Martin conceived the great design of leading an Argentine army across the Andes, conquering the Spaniards in Chile, setting that country free, creating a navy on the Chilean coast, destroying Spanish naval power in the Pacific, and, having acquired command of that ocean, attacking and overcoming the Spaniards in Peru along the same line of approach from the west that had been followed by the old *conquistadores*. He executed his design with amazing audacity, tenacity of purpose, power over men, organizing skill, and self-devotion. He overcame obstacles apparently insuperable, achieved one of the really great military and political movements of history, and ruled in Lima as "Founder of the Liberty of Peru." In the meantime, Bolivar had led successful revolution in Venezuela and Colombia, and the union of the northern and southern patriot forces seemed about to complete the eradication of Spanish rule in the Southern Continent.

The character and conduct of Bolivar soon made it plain that he regarded San Martin as a rival, that they could not coöperate, and that the continuance of both commands meant strife for personal power between the two leaders — to the destruction of the patriot cause. Then San Martin gave an example of self-sacrifice more admirable than his victories or his strategy. In order that a united patriot army might oppose the forces of Spain, he effaced himself, laid

down his command, his titles, his dignities, and power. He sent to Bolivar his pistols and his war horse with this note:

> Receive, General, this remembrance from the first of your admirers, with the expression of my sincere desire that you may have the glory of finishing the war for the independence of South America.

And he left the scene of his great achievements never to return. Bartolomé Mitre says truly:

> History records not in her pages an act of self-abnegation executed with more conscientiousness and with greater modesty.

San Martin died misunderstood and in exile. To the generals and politicians who were plunging the South American republics into continual bloodshed for their own selfish ambitions, and to their adherents, the spirit of self-assertion which demands power and fame seemed admirable and the spirit of self-effacement for a cause seemed weakness. But as the people of those countries have risen to a higher plane of duty and honor, there has come the realization that the great South American — the one worthy to be named with Washington as the example and inspiration of patriotism — was the modest soldier who cared more for his cause than for his office, and who was willing not merely to wield power, but to give up power, for his country's good.

It has always seemed to me that Mr. Tilden pursued a very patriotic and commendable course when the election to the presidency was in question between him and Mr. Hayes in 1876. The election was very close and there was no doubt that if all the votes actually cast in the Southern States received effect Mr. Tilden would be declared elected; but many votes had been thrown out by the state returning boards in the South on account of alleged fraud and intimidation that had prevented the casting of other votes, which, if cast, would probably have caused a different result. There was a question that inevitably would have resulted in civil war in any country where the personal idea was predominant

in politics, and there were in this country many men of high character and standing who urged that Mr. Tilden's title to the office should be asserted by armed force; but he was decided and immovable in the position that he would permit no breach of the peace of the country in his behalf, whether he got the presidency or not. The questions were finally submitted to a special court devised for the purpose, and that court by a majority of one decided in favor of Mr. Hayes. So Mr. Tilden lost the presidency; but he gained what was of far greater value — a title to the esteem and gratitude of all good citizens. He probably rendered a greater and more permanent public service than by anything he could have done as President.

The second stage of development in popular government is reached when the people of a country have passed beyond exclusive attachment to individual fortunes and, turning their attention to questions of principle or policy or material interest, have arrayed themselves in support of their various opinions or desires, but have not yet reached the point where they are able to subordinate minor considerations upon which they differ to those of primary and vital importance upon which they agree. In this stage of development many groups make their appearance, each having some controlling idea which it regards as of primary importance. Sometimes those ideas are local; sometimes they are religious; sometimes they relate to special class or business interests; sometimes they relate exclusively to some special political, social, or economic question. The most conspicuous result of such a condition is found in the election of legislative bodies, in which representatives of all the different groups are found, and in which no party has a majority; so that no affirmative legislation is possible except by trades and combinations between different groups. One effect of this legislative condition is that in countries where the

executive is responsible to the legislature the executive cannot depend upon steady and constant support from the law-making body in any line of policy, because the combination of groups is continually changing and the executive that has a majority today may find itself in the minority tomorrow. There are some countries where this government by groups exists, in which the constant fluctuation of legislative combinations and majorities leads to very frequent changes in the responsible ministry; and in those countries good administration is almost impossible, not only because there can be no continuity of executive policy, but because the heads of the executive departments who constitute the ministry are seldom able to do more than to begin to learn their business before they are turned out to make place for new men, who have again on their own account to begin the same process of learning the business. The most corrupt and unsatisfactory period in the government of Great Britain was when Parliament was divided into groups in this way.

Great Britain has passed out of that stage into the third and higher stage of development, in which two great political parties oppose each other upon fundamental differences, the members of each differing in many respects among themselves upon minor questions but not allowing those differences to break up their party. This condition now exists both in England and in the United States. Under it the executive government has the continuous support of its own party, and so long as that party is in the majority there is a united and effective government. When that party ceases to command the support of a majority of the people, it goes out of power and the other party comes into power to receive an equally effective support until another change comes.

The course of evolution in popular government is thus from the formation of an indefinite number of individuals

into parties with the idea of putting men into office, to the formation of an indefinite number of parties grouped especially with regard to advancing special interests and ideas, and thence to the formation of two great parties representing fundamental differences in the general principles and policies of government. The development is from the unmixed preponderance of personal and selfish motives to the predominating motive of common good for the country.

Since personal selfishness and desire for personal aggrandizement are by no means eradicated from human nature, there is a constant tendency in political parties to revert to a lower type. Party leaders frequently use for their own personal advantage the power conferred upon them for advocacy of those ideas which the members of the party believe to be for the best interests of the country. This tendency is promoted by every man who takes part in political activity with the primary purpose of getting an office for himself, and it is discouraged and reduced by every man who takes part in political affairs with the primary purpose of doing effective service to advocate the principles that he believes in and to elect officers who will apply those principles, leaving the question of his own personal reward and advantage to come from such recognition of his service as others may think it deserves.

The tendency to revert to the lower type of organization which concerns itself solely in the obtaining of office is one of the evils to which I referred in a former lecture when discussing the objections sometimes urged against taking part in politics. This evil has been very prevalent in American politics, and it is still prevalent, although to a less extent than formerly. With us it takes the form of grafting upon the great parties of voters organized for the advocacy of certain declared principles an organization of active party workers for the distribution of offices.

The process is a very plain and natural one. The object for which the voters have associated in a party is to bring about the application of certain principles and conformity to certain policies in carrying on the government of the country. The only way to secure that is by agreeing upon and voting for candidates for office who, if elected, will observe those principles and follow those policies. There is an immense number of these offices, of varying grades, from the presidency down; there are national and state, county and city, town and village officers, legislative and executive and judicial officers; great numbers of clerks and collectors, inspectors and watchmen, agents of different kinds, mechanics, and skilled and unskilled laborers. Comparatively few of these, and generally the most important, are actually elected by the people; the great mass of them, particularly of the minor officers and employees, are selected and appointed by the officers who have already been chosen by election, and about this selection and appointment the people have nothing to say except as individuals among them may make requests or recommendations to the appointing powers.

The proper and necessary operations of a party cover a wide field of activity. They include the selection of candidates for the elective offices. This is done sometimes by means of the direct expression of the wish of the voters of the party, but more frequently by having the voters of the party elect delegates to conventions which meet and select the candidates. The operations of the party also include the consideration, discussion, determination, and statement of the position of the party upon the important public questions of the day. This also is done by the same conventions which select the candidates. The operations of the party also include appeals to the people to vote for the candidates which represent the party. These appeals are made by personal canvasses from house to house, by public meetings

and speeches, by the circulation of campaign literature through the mails and through the columns of the press. There are also included the general and concerted efforts to get out the vote, to see that the voters of the party do not, through indifference, stay at home and neglect to vote at all; and also the manning of the polls under concerted and systematic arrangement, for seeing that the voters of the party are not denied their rights at the polls, and that no fraud is perpetrated or undue advantage is taken by the members of the other party in the voting or the counting of the vote. All these things require an immense amount of hard work and the participation of a great number of men, and all these workers have to be directed. System, organization, control, leadership, are absolutely necessary; leadership of opinion in the framing of platforms and in the selection of proper candidates, and leadership of administration in the carrying on of the work.

This enormous mass of work preceding and leading up to the exercise of the franchise and, so far as we can judge both from reasoning and experience, essential to make the ballot effective, is done by volunteers, who receive no compensation from the state for the public service they are rendering and must be inspired by some other motive. So well established is the understanding that these are the processes by which Americans work out the results to be confirmed by the ballot, that laws have been made in the larger states, where political affairs are most complicated, to regulate proceedings in the political parties by primary laws designed to prevent fraud in the selection of delegates to conventions and in the choice of candidates.

It is not at all unnatural that among the men who do this voluntary work resulting in the selection of candidates and their election to public office there should be many who desire to be appointed to the offices and employments at the

disposition of the officers so elected. Unfortunately, there has grown up in the United States a practice of considering the service of party workers leading to the selection and election of candidates as a controlling reason for the appointment of those party workers to the places at the disposal of the candidates after their election; and that practice has resulted in the prevalent understanding that there is an implied agreement by every successful candidate for an elective office to reward support by exercising his governmental powers for the appointment and employment of his supporters. The practice originated in the complicated political activities of the great states of New York and Pennsylvania early in the last century. It was extended to the Federal Government under the presidency of Andrew Jackson, and the most familiar statement of it was made by William L. Marcy in the Senate of the United States in the debate on Jackson's nomination of Martin Van Buren to be minister to England. Marcy said:

> It may be, sir, that the politicians of New York are not so fastidious as some gentlemen are as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office; if they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule that to the victor belong the spoils of the enemy.

The application of this principle is not confined to the demand of the individual party worker upon the successful candidate for a recognition of his personal service; it goes a step further back and affects the action of the party worker in the selection of party leaders who will support and press the party worker's claim to recognition from the public officer when elected. It determines the selection of the party committees and their chairmen, from the lowest local committee in the assembly district or town or village, who

are expected to press the claims of the men who elect them for appointment and employment, up through the county and state committees to the national committee and the chairman of the national committee, who directs the vast machinery of the presidential election. It converts the whole party organization commissioned by the voters of a party to conduct the systematic proceedings which shall enable them to maintain and advance their political principles by their votes, into an organization primarily for the parceling out of offices, and incidentally for the promotion of party principles so far as may be necessary to keep the voters of the party from repudiating the party organization.

Several results follow from the application of this principle.

It leads to a selection of candidates for office based primarily on their supposed willingness to carry out the implied obligation to use their official powers, if elected, for the reward of their party supporters, the fitness of the candidates and the benefit which the public will receive from their service being considered only when it is probable that an election will be close and that every vote will be needed.

It leads to the exercise of the appointing power by the public officers who are elected in this way, not with reference to the public service which the appointees can render, but with reference to the political service which they have already rendered in the selection and election of the officer. It goes farther than this in its effect upon the exercise of official power, for by natural extension it is made to cover an assumed obligation on the part of public officers in the performance of their other duties to act, not with reference to the public good, or for the promotion of the great policies of a party, but in such a way as to secure the greatest number of offices with the greatest possible emolument to the members of the party organization. This obligation is assumed to rest upon legislators, and sometimes even upon judges.

It demoralizes the public service, by establishing a tenure of office which depends not upon faithful and efficient service to the country, but upon service in party primaries and caucuses and conventions; and it tends to make the elected officers feel responsible not so much to the public opinion, which judges of their fidelity and efficiency, as to the party managers who are to determine whether they shall be renominated or not. This cannot fail to result in poor service. It is impossible to have good service in any business, public or private, unless the character of the service itself is to determine whether it shall continue. This has been very well illustrated in a way which any one who has been in the habit of frequenting the city of New York during the past twenty years can appreciate. That city formerly had a street-cleaning department managed by a bi-partisan police board composed of two Democrats and two Republicans. The members of the street-cleaning force were appointed for the political committees of the two parties. The party committees and the party leaders in the different assembly districts in the city were furnished with tickets, which they distributed to their supporters. On the presentation of these tickets the holders were treated as entitled to employment on the force. Their retention on the force depended entirely on the favor of the party managers from whom they got their tickets — not at all upon the way in which they did their work. They were lazy, inefficient, undisciplined, and without effective supervision, because under that system no supervision could have any effect; and the streets of New York were continuously disgracefully filthy. The evil became so great that the legislature at Albany changed the law and provided for a superintendent of street cleaning; and about that time one of the occasional revolts of the city of New York occurring, a good business man was made mayor and he appointed Colonel George E. Waring, of New-

port, a distinguished sanitary engineer, superintendent of street cleaning. Colonel Waring threw overboard the whole existing system, established a rigid system of supervision, paid no attention to so-called political claims, and promptly dismissed every man who was found to be lazy or inefficient. Within a few months he had an active and effective force; the streets of the city were swept clean and kept clean, and they continued so until Colonel Waring's lamented death and for a long time after, until the system which he had inaugurated gradually fell into disuse and the old habit of using the street-cleaning department as an opportunity for giving employment on the grounds of party service was resumed; and the city has become again disgracefully unclean.

The application of the principle announced by Senator Marcy tends to weld the official personnel of party organization into a compact body of men, who, depending upon each other for personal advancement, stand by each other at all hazards and oppose the power of organization to every effort on the part of the mere voting members of the party to take any course in party action which may interfere with the regular business of bartering offices for support and support for offices. As the men who form such a compact official organization expect to make their living by it, they are able to devote their entire time to the manipulation of party affairs, and in that way have a great advantage over the business and professional men, who must devote themselves to their business and professions and can give but a small part of their time to political activity.

Another and peculiar result of this system is the creation, in some places where the system is in full force, of double governments, one carried on by the executive and legislative and judicial officers provided for by law, the other carried on by the official organization of the party which happens to be in the majority, under the direction of the party leader,

who controls the action of the lawful officers. There have been cities in which substantially the whole board of aldermen have invariably and without question voted as they were directed by the leader of the majority party in the city, and upon all important questions have waited habitually to get his orders before voting; in which the executive and administrative officers have sought his instructions rather than the instructions of the mayor, and in which the minor judicial officers have uniformly conformed their judgments to his wish. There have been states in which the party leader has habitually determined what bills should and what bills should not be passed by the legislature, and in which the majority of the legislature have uniformly sought and obeyed his instructions. The lawful officers are thus subservient to the party leader, because they hold their offices at his will by virtue of the compact organization behind him, which will control future conventions, nominations, elections, and appointments.

A peculiarity of this kind of government is that the real governing power is without legal responsibility and is practically free from statutory legal restrictions. The party leader combines legislative and executive functions, and he often trenches upon judicial functions. He acknowledges no obligations to the public; his obligations are simply to secure offices for his followers. To pay a legislator for his vote, or an executive officer for the exercise of his discretion, is a felony, and for an officer to receive a bribe is a felony; but the party leader is under no legal prohibition against receiving any consideration or acting upon any personal interest in the exercise of his power, which controls both the vote of the legislator and the discretion of the executive. The only danger he has to apprehend is that the voters of his party may repudiate his candidates, and against that he is measurably protected by the fact that such action will be

at the cost of putting the government into the hands of those who would administer it upon principles and according to policies which the voters consider unsound and injurious.

Such a system is not essential to effective party organization. On the contrary, it tends to prevent effective party organization; it tends to keep out of the organization the men whose service would be most effective, and to make more difficult the work of the men who take part in the organization with the real purpose of making it accomplish its legitimate results. It tends to make an organization which does not really represent the voters of the party, and to leave the voters of the party without any genuine representative organization. It results in elections in which the voters of the country have no opportunity to express by their ballots their real choice of candidates or their real opinions upon public questions. It weakens one of the great agencies for carrying on a popular government and introduces an injurious imperfection into the method by which alone public opinion can be made effective through governmental machinery.

The whole system is pernicious and discreditable to American citizenship. It ought to be done away with and political parties ought to be brought back to the sole performance of their proper function as organizations for the promotion of principles and policies, free from the control of mere office-trading combinations.

It is, however, mere folly to say that the existence of such an evil furnishes a reason why educated, self-respecting Americans should not take part in the work of the political parties with which they vote. On the contrary, the existence of the evil presents a manifest and urgent duty to the conscience and patriotism of every competent American.

The duty is to enter into the work of party activity and help make the party organization what it ought to be. The

duty rests upon each intelligent citizen in his own community to incite the voters of the party he believes in to take charge of their own affairs, and to substitute party organization and party leadership which are really representative of them in place of the party organization and the party leadership which are maintained by the distribution of office for the sake of office.

IV

THE GROUNDS FOR ENCOURAGEMENT

THE third lecture of this series set forth the evils resulting from the usurpation of party control by a mere office-bartering combination which takes the place of organization for legitimate party purposes, and the citizen's duty to aid in doing away with such usurpation.

Such a change is entirely practicable. To doubt that it can be made is to doubt the capacity of our people for self-government, because the change requires only such willingness to perform the duties of citizenship as is essential to the successful exercise of popular self-government. It cannot be produced suddenly or without systematic and continuous effort, or by mere exhortation or protest. It must come slowly, in the ordinary course of political development. It cannot be expected that the men who compose party organization will become suddenly altruistic. The evil to be dealt with is a strong affirmative assertion of the self-interest of the old type of party organizers, and it cannot be overcome by a mere negative. It must be met by a stronger assertion of the more powerful interest of the party voters. Such a system is not necessary to secure the filling by a member of the dominant party of every office the duties of which bear any relation to the effectiveness of party policy; on the contrary, it tends to the filling of offices by men who are indifferent to party policy, and whose allegiance is solely to their own personal interest. The destruction of the system will not exclude party workers from public office; it will simply deprive them of their claim to public office when they cannot justify it on public grounds.

The obnoxious system already has been greatly reduced in its scope and power. The modern civil-service method of selection for appointment has withdrawn from the bargain

counter a great mass of governmental offices and employments individually of minor importance but in the mass of very great importance. The governments of our insular possessions have been established and maintained without any regard whatever to the payment of political debts. No attention is paid to party affiliation or service in appointments in the military and naval services. Within the past year the consular service has been brought under new regulations, by which all the higher places are filled by promotion on the basis of efficiency as established in the service, and the lower positions are filled by original appointment upon thorough examination. The fourth-class post offices have been brought under a new rule, which makes the continuance of the office depend upon the merit of the officer rather than upon political favor. Thus, the stock in trade of the office business is being rapidly reduced. Throughout the Federal service the theory of implied obligation to pay political debts with offices is gradually and very generally weakening and tending to disappear. The widespread pressure for direct primaries indicates a determination among party voters to secure a real expression of their own will in the selection of candidates. It needs only to continue the process that is now going on, in order to free these great agencies of government from the false organizations which have so long oppressed them, as the Old Man of the Sea on the neck of Sinbad; to make our party organizations generally, as they already are in some places, really representative; and to make party leadership depend, as it does now in some states, upon leadership of opinion, upon the confidence of the community, upon political wisdom, upon superior ability to assert and maintain the principles and policies of the party.

In the whole field of popular government I am convinced that one of the plainest duties of citizenship is hopefulness, and that pessimism is criminal weakness.

If one is to judge the world and the conduct of men by comparison with a standard of ideal perfection, of course everything will be found wrong. If the question we ask is whether the world, or any community in it, is good or bad, right or wrong, we must recognize a painful degree of error and selfishness, and injustice and cruelty, and indifference, and ignorance.

The true question, however, is not what the world is, but what its tendencies are. Is it moving towards better things, or worse? Is the level rising, or falling? Mark the condition and character of civilized peoples in successive centuries or generations, and see whether liberty and justice and righteousness have been gaining, or losing. See whether education has gained ground, or lost; whether men generally are more, or less intelligent; whether they have grown more cruel, or more kindhearted; more selfish, or more regardful for the rights of others; whether government is more pure, or more corrupt; whether the laws are more, or are less just — more, or less respected. Thus you will learn whether to look to the future with confidence and hope, or with distrust and with forebodings.

You will find that such an inquiry yields a most cheerful and encouraging response as to the condition and probabilities of popular government.

There is not one element of character, of capacity, or of practice going to make up what government ought to be in which there has not been steady and great advance in the progressive development of government by the people.

It is impossible to read an account of the life of the people of any civilized country in any past century without finding an amazing degree of cruelty, of oppression, of immorality, of corruption, and of class privilege regardless of common right, which has now been substantially done away with.

To go no farther back than the early years of the last century in England, the reform of the criminal law, under which more than two hundred offenses were punished by death; the struggle for Catholic emancipation; and the revolution in parliamentary representation, which destroyed the rotten borough system and transferred power from the landed aristocracy to the great middle class in England, mark the positions from which popular government has advanced.

If we go back to the early days of the eighteenth century John Morley says:

> A candid and particular examination of the political history of that time, so far as the circumstances are known to us, leads to the conclusion that Walpole was the least unscrupulous of the men of that time.

Yet he says:

> . . . That Walpole practiced what would now be regarded as parliamentary corruption is undeniable. But political conduct must be judged in the light of political history. Not very many years before Walpole a man was expected to pay some thousands of pounds for being made Secretary of State, just as down to our own time he paid for being made colonel of a regiment. Many years after Walpole, Lord North used to job the loans, and it was not until the younger Pitt set a loftier example that any minister saw the least harm in keeping a portion of a public loan in his own hands for distribution among his private friends. For a Minister to buy the vote of a Member of Parliament was not then thought much more shameful than almost down to our own time it has been thought shameful for a Member of Parliament to buy the vote of an elector.[1]

Lecky says of Walpole and his times:

> He governed by means of an assembly which was saturated with corruption, and he fully acquiesced in its conditions and resisted every attempt to improve it. He appears to have cordially accepted the maxim that government must be carried on by corruption or by force, and he deliberately made the former the basis of his rule. . . . The systematic corruption of Members of Parliament is said to have begun under Charles II, in whose reign it was practiced to the largest extent. It was continued under his successor, and the number of scandals rather increased than diminished after the Revolution. Sir J. Trevor — a Speaker of the

[1] *Walpole,* By John Morley. London. 1889. In *Twelve English Statesmen* Series.

House of Commons — had been voted guilty of a high crime and misdemeanor for receiving a bribe of 1,000 guineas from the city of London. A Secretary of the Treasury — Mr. Guy — had been sent to the Tower for taking a bribe to induce him to pay the arrears due a regiment. Lord Ranelagh, a paymaster of the forces, had been expelled for defalcations in his office. In order to facilitate the passing of the South Sea Bill, it was proved that large amounts of fictitious stock had been created, distributed among, and accepted by, Ministers of the Crown. Aislabie, the Chancellor of the Exchequer, was expelled, sent to the Tower, and fined. The younger Craggs, who was Secretary of State, probably only escaped by a timely death. His father, the Postmaster-General, avoided inquiry by suicide, and grave suspicion rested upon Charles Stanhope, the Secretary of the Treasury, and upon Sunderland, the Prime Minister. When such instances could be cited from among the leaders of politics, it is not surprising that among the undistinguished Members corruption was notorious.[1]

Lecky says, also, of the same period:

The magistrates were in many cases not only notoriously ignorant and inefficient, but also what was termed " trading justices," men of whom Fielding said that " they were never indifferent in a cause but when they could get nothing on either side." The daring and the number of robbers increased till London hardly resembled a civilized town. " Thieves and robbers," said Smollett, speaking of 1730, " were now become more desperate and savage than they had ever appeared since mankind were civilized." The mayor and aldermen of London in 1744 drew up an address to the King, in which they stated that " divers confederacies of great numbers of evil-disposed persons, armed with bludgeons, pistols, cutlasses, and other dangerous weapons, infest not only the private lanes and passages, but likewise the public streets and places of usual concourse, and commit most daring outrages upon the persons of Your Majesty's good subjects whose affairs oblige them to pass through the streets, by robbing and wounding them, and these acts are frequently perpetrated at such times as were heretofore deemed hours of security." . . . The more experienced robbers for a time completely overawed the authorities. " Officers of justice," wrote Fielding, " have owned to me that they have passed by such, with warrants in their pockets against them, without daring to apprehend them; and, indeed, they could not be blamed for not exposing themselves to sure destruction; for it is a melancholy truth that at this very day a rogue no sooner gives the alarm within certain purlieus than twenty or thirty armed villains are found ready to come to his assistance."

[1] *A History of England in the Eighteenth Century*, William Edward Hartpole Lecky. Vol. I, p. 393.

At the same period the country roads of England were beset by highwaymen. Dick Turpin, Jonathan Wild, and Jack Shepard shared the admiration and sympathy of the people with the daring smugglers who waged continual war on all the coasts against the collectors of the government revenue. The customs of the country permitted, and the laws did not prevent, the plundering of all wrecks upon the coasts. The jails were filthy breeding places of pestilence. There was but little systematic effort for the relief of the insane, the diseased, the injured, or those helpless through infancy or age; and there was but little effort toward education or enlightenment outside of the fortunate few who made up the landed aristocracy.

When we reflect that these conditions existed so late as during the lives of the men who signed the American Declaration of Independence, and draw a comparison with the conditions existing today through the development of the same political institutions, under the control of the same race, in England, in the United States, in Canada and Australia, we cannot fail to realize that the evolution of self-government has been accompanied by amazing progress, not only in material prosperity, but in honesty, in humanity, and in the capacity to maintain order and do justice that leads to the higher intellectual and spiritual life of mankind.

In our own country we may take for comparison the shameful breach of the terms of Burgoyne's surrender, the refusal of the States to give effect to the provisions of the treaty of peace with England for the protection of the loyalists; the impotence of the Continental Congress, which Charles Lee described as "a stable of stupid cattle that stumbled at every step"; the jealousies, the pettiness, and the narrow prejudice that hampered and almost ruined the work of Washington; the incapacity of administration to

which, and not to poverty, was due the distress at Valley Forge, where the footsteps of our poor soldiers could be traced by the blood on the snow, not because there were no shoes and stockings, but because shoes and stockings were not delivered where they were needed.

The humiliating experience of the second war with England revealed inefficiency and incompetency of federal administration that would be ludicrous if it were not lamentable.

It would not be possible now to elect such a man as Aaron Burr vice-president of the United States; or to leave in command of the army a man like Wilkinson, who was known to be in receipt of an annual payment of two thousand dollars from Spain while we were in controversy with that country over the possession of Florida, and whose friends defended him by the assertion that while he took the money he did not mean to give Spain any equivalent for it.

Such a condition of affairs as prevailed in our Congress at the time of the *Crédit Mobilier* business could not exist now. The atmosphere which existed in Washington at that time made it possible for a group of men, most distinguished and powerful among the public servants of the nation, to purchase or accept gifts of securities of corporations upon whose interests they were to vote in one or the other House of Congress. The whole tone of the public service was such that their moral vision was obscured. The same men today would find it impossible to do what they did then, because there is a clearer air and a better recognized standard of official morality. The conditions which made it possible for the unfortunate Belknap, as Secretary of War, to sell appointments, and for the trusted official aides of the President to be smirched by the whisky frauds of Grant's second administration, happily no longer exist, and no longer can exist.

The very nature of the evils which we are now most earnestly calling upon the Government to remedy is an

evidence of the advance in governmental ethics and efficiency, for those evils consist very largely of practices which formerly passed unnoticed, while still greater evils engrossed the efforts for reform.

A fair illustration of this is to be found in an old statute of the state of New York. It is entitled " An Act instituting a lottery for the promotion of literature and for other purposes," passed April 13, 1814. It begins:

> WHEREAS, Well-regulated seminaries of learning are of immense importance to every country, and tend especially, by the diffusion of science and the promotion of morals, to defend and perpetuate the liberties of a free state: Therefore,
>
> SECTION 1. *Be it enacted by the People of the State of New York, represented in Senate and Assembly,* That there shall be raised by lottery, in successive classes, a sum equal in amount to the several appropriations made by this act.

The act then proceeds to appropriate the sum of one hundred thousand dollars for the benefit of Union College, forty thousand dollars for the benefit of Hamilton College, forty thousand dollars for the Asbury African Church in the city of New York for the purpose of enabling them to discharge a debt and to establish a school, and thirty thousand dollars for the College of Physicians and Surgeons; and it makes certain provisions for the benefit of Columbia College.

There was a tradition among American college men in my youth that old Doctor Eliphalet Nott — *clarum et venerabile nomen* — bought out the interests of the other institutions under this statute and made much money for Union College out of the lottery, doubtless greatly to " the diffusion of science and the promotion of morals."

I have often thought in recent years, when I have seen very good people wringing their hands over the failure of government to wholly suppress gambling in its various forms, that a reference to this standard of the year 1814 showed the difficulty to be, not the decadence of government, but the

advance of morals; not the failure of government to perform its duty as well as that duty was once performed, but the greater burden which we are constantly putting upon the government to make its enforced restrictions upon a minority of the people keep pace with the voluntary self-control of the majority of the people.

Many illustrations of the same process can be found. The objectionable railroad practices which are now so widely and justly condemned, and which furnish so fertile a source of political discussion, are not new practices; they are old practices which formerly passed *sub silencio*. The railroad rebates which are now forbidden by law, and for which great corporations are being indicted and convicted, are merely a form of the discriminatory rates which once prevailed without objection. Thirty years ago all railroads gave special rates to shippers. That was the existing form of competition, and competition not only was permitted, but it was enjoined by law, and any attempt to restrain it was, as it now is, unlawful. It was by giving special rates that railroad companies induced people to build factories and packing houses and elevators and a great variety of other business establishments along the lines of their roads; that was the way they built up their business and built up the country through which the roads ran. In recent years, however, the people of the country have come to an appreciation of the idea that these great public agencies, which have conferred upon them the right of eminent domain and perpetual franchises to enable them to do public service, cannot give special rates to some men without doing injustice to other men; and that the common right of the people demands equality of facility and of cost in the transportation which the railroads are bound to furnish, and condemns special privileges to one as against another. The lesson of all this is that the prosecutions and convictions for violation of the anti-rebate law —

things which were never heard of thirty years ago — are not evidence that we are growing worse, but evidence that we are growing better; that our Government is applying a higher standard of justice in the control of public utilities.

The same is true of the management of corporations and the manipulation of securities, to which attention has recently been called sharply by the testimony before the Interstate Commerce Commission regarding the reorganization of the Chicago and Alton Railroad. Thirty or forty years ago, when the management of the Erie Railroad and the Atlantic and Great Western and the Union Pacific Railroad attracted public attention, the things done by corporate managers were so much worse that the Chicago and Alton affair would not have received any notice at all. The railroad wrecker was a common type of railroad manager. A large part of our people assumed that to be a permissible game to play, and the rules of the game did not go much beyond the exclusion of ordinary forgery, larceny, and fraud at common law. Since then a higher standard is asserting itself, which recognizes the scrupulous obligation of trusteeship on the part of the railroad manager and promoter, and under that standard much is properly condemned which before would have passed without notice. It is perfectly safe to assert that the standard of probity and fidelity among the corporation managers of the country is higher now than it ever has been before; and yet there is more complaint now than there ever has been before, because our people demand that a more rigid rule of morality shall be applied by statute and by the courts and in administrative supervision than they formerly considered necessary.

The prosecutions which the Departments of the Interior and of Justice have been conducting against the land thieves in the West — the men who have been appropriating to themselves the public timber lands and grazing lands and

coal lands — have awakened intense indignation among the defendants and their friends, because the wrong was so inveterate that they had come to look upon it as a right. For more than a generation it had been regarded as a natural and unobjectionable thing to get possession of the public land by hook or by crook; and when the officers of the law presented and enforced the novel idea that it was as dishonest to deprive the Government of its land illegally as to deprive an individual of his land illegally, it seemed a cruel injustice. There was simply a little advance of the moral standard which gave life to laws that had been dead before. The whole system of the Federal Government has been lifted up to a higher plane of clearer moral vision, just as the whole system of British administration has been lifted up since the corrupt days of Walpole.

The elective franchise has become a more honest expression of popular will. Only men who are now growing old can remember, and history has not yet adequately recorded, the gross frauds, the tricks and devices, and acts of violence which prevented fair elections forty-odd years ago, before the federal election laws of 1870 and 1871 — laws which have passed out of existence, but have left their impress upon the legislation of the States of the Union. In those days, before there was any registration of voters, the wayfaring man could vote the resident out of house and home, and the count of votes was at the mercy of anybody who could succeed in buying a local election officer. The ballots with which to vote were furnished only by the local party organization, and were printed and folded and bunched and distributed by the workers of each party. I have known the voters of a congressional district to go to the polls on election day and find all the congressional ballots distributed for one candidate, and none to be obtained for the other candidate, because the local leader on one side had been

bought by the other side. I have seen a file of men marched out of a tramp lodging house with their ballots held aloft in one hand continuously in plain sight until they had deposited them in the ballot box, in order to give the necessary evidence that they were voting according to the contract under which they were immediately thereafter to be paid. Now, the system of registration and the revision of the registry lists are substantially effective to confine voting to the qualified voters. The ballot is furnished by the state; the method of voting upon the Australian ballot in all its forms, by marking it in secret, makes bribery uncertain and unprofitable, because it is impossible to tell how any one votes, and the man who would take money for his vote cannot be depended upon to vote as he has agreed. Both the voting and the counting are protected by adequate supervision and full opportunity for watchers in the interest of the candidates and of the different parties. The change from dishonest and unfair elections to honest and fair elections is fundamental to the successful working of popular government and is in the course of ordinary and natural political development. It is the same kind of change which has taken place in England since the days before the Reform Bill of 1832; and that it is permanently effective we may be sure, because it is the natural course of political development here, as it has been in England.

I need not describe the growth, the maintenance, the systematic regulation, and efficiency of public and private charities, of public and private institutions for education, for the diffusion of knowledge, for the prosecution of scientific research and experiment, and for the encouragement of art — the enormous sums of money applied to these purposes, the active and unwearying efforts of multitudes of men and women devoted to them; for these are a part of the daily life of every American community. They show an advance in

public intelligence and moral qualities working through that associated effort which is essential to government, and to which government is essential; and they justify the expectation of continued advancement in the future.

The fact that American popular government now has serious and difficult questions to deal with is no just cause for distrust. Government always has difficult questions to deal with, and we are assured by the advance already made of democracy's competency in the future. The great questions of capital and labor, of concentrated corporate wealth, and of diffused and general well-being, are merely natural incidents to progress.

The inventions and discoveries of the last century, the applications of science to useful arts, have enormously increased the productive power and therefore the wealth of mankind. By the use of machinery and newly devised processes the same number of men can produce, in manufacture and in agriculture, a far greater quantity and variety of the objects which contribute to the necessities, the comfort, and the pleasures of man than in former years. Unsuspected riches of the earth have been revealed and appropriated. Facilities for transportation have given a value to products which would once have been worthless because not needed at the point of production and not available for use elsewhere.

We are now witnessing the natural and inevitable struggle for a fair division of this new and rapidly increasing wealth. The ideal distribution would be that the inventor and discoverer, the organizing and directing intelligence and energy, should have a fair share for their contribution; that the capitalist should have a fair share for the use of his money and the risk which he incurs, measured by the chances of loss which so frequently turn against him; that the wage-worker should have his fair share in increase of wages and

decrease in hours of labor, because he produces so much more by his labor than he formerly did; and that the consumers should have their fair share in decrease of price of the objects which are produced with so much less expense and effort.

It is inevitable that each one of these classes should differ from all the others as to the share to which it is entitled, and that there should be a continual struggle between them in the process of adjustment leading to a fair division. That process and that struggle will continue so long as wealth continues to increase.

One inevitable incident of this process is that at the outset some of these classes will get more than their share, and these are usually the organizer and the capitalist, because they have the advantage of initial position in respect of each new increment of wealth; so that the struggle ordinarily takes the form of demands by the wage-workers and the consumers to increase their shares of the new wealth at the expense of the capitalists and the organizers. Another incident of the process is that the laws framed to meet one set of conditions are constantly being found to need modification in order to insure just distribution of wealth and just rewards of intelligence, skill, and industry under the new conditions brought about by industrial progress. We are constantly finding that laws formerly adequate, when applied to new conditions permit some men to get lawfully more than is fair, while others cannot get lawfully as much as their fair share out of the industrial activity to which the whole community contributes in varying ways and degrees. For example, the laws relating to corporate organization, capitalization, consolidation, reorganization, and extension, which formerly served their purpose very well, are now seen to make it possible for some men who get into corporate control to make enormous fortunes without apparently violating any law, but for which

they render really no return whatever to the wealth of the community. Morally, the action of these men does not necessarily differ in kind from the action which always has prevailed in the business world, where men determine the price of their commodities rather by what they will bring in the market than by any estimate of the good they will do the purchasers. But these great transactions call attention sharply to the fact that the legal rules governing corporate business require to be changed so that unconscionable advantages cannot be lawfully obtained; and moreover such transactions are often accompanied by such suppressions of full information and disregard of fiduciary obligations as to show that the law needs to be strengthened in those directions.

The facilities of transportation and communication which enable modern business to spread over a great expanse of territory have made it possible for so-called trusts and combinations to be made for the purpose of driving out competitors, restricting production and increasing prices, for which the old and simple rules designed to prevent engrossing, forestalling, and regrating in the English rural community are quite inadequate; and new laws and new agencies for their enforcement are necessary to accomplish the same results.

On the other hand, labor organizations, designed for the just purpose of securing fair treatment as to employment, wages, and hours and conditions of work, are on their part endeavoring to put up prices, restrict production, and drive out competition by stringent rules which prohibit any member from doing more than a specified amount of work each day under penalty of expulsion, and which prohibit the employment of any one not a member of the union under penalty of a strike.

All of these things are but incidents of the process of adjustment in the division of the new wealth; some of them

come from attempts to get what is fair and some of them from attempts to get more than is fair. Our popular government is dealing with them assiduously, by awakened public opinion gradually crystallizing into laws adapted to meet the new conditions. This process involves no new principles, but merely the adaptation of the same old principles of law with which our fathers were familiar. The things which are happening and the necessity for continual reform of law and administration argue no decline in business morality and no inadequacy of our political system to continue its efficacy and its improvement.

There is occasionally undue excitement; but it is temporary, and whenever it is seen to approach the verge of destructive action it is promptly calmed and restrained by the sober judgment of the people.

Some workingmen's associations hold meetings where violent speeches are made and carry red flags in processions; but so far, whenever a square issue is raised among any great and widespread body of laboring men between anarchy and socialism on one side and the principles which underlie the American social and industrial system on the other, the decision is in favor of good Americanism. The Secretary of Commerce and Labor informs me that within the last dozen years the percentage of socialists in the labor organizations of the United States has decreased from about thirty-three per cent to about eight per cent. I do not know to what extent this has been by change within the labor organizations, or to what extent by separation of socialists from the organizations. However it has come about it indicates that so far the sober judgment of the great mass of the wage-workers of the United States is in favor of the conditions of their present prosperity as against socialism.

In considering the efficiency of democratic institutions we must remember the millions of immigrants who have

come to us. Americans acquired habits of self-control and political capacity from several centuries of self-government in the American colonies and in the United States down to the middle of the nineteenth century, and from many centuries of political growth in England before the colonization of America. The vast mass of our immigrants, however, have come from countries in which there was but little political training or development among the people. Since 1850 over twenty-one million immigrants have entered the United States. Most of these have come with the inherited tendencies, the traditions, and the acquired habits of hopeless submission to a superior external power, or of violent struggle against it, and with little, if any, preparation either of habit or understanding, for the performance of duties of government themselves; and they have had to be educated in mind and in character for self-government.

By far the greater number of the violent and extreme agitators among the laboring men in the United States are the comparatively newly arrived immigrants, whose habits of thought and emotional attitude have been acquired in their former homes. I believe it to be true that, making due allowance for some individuals of the crank variety, and for some individuals who are really ordinary criminals with the shrewdness to carry on their war against society under color of philosophical theories, the tendency of the newcomer to violent socialistic or anarchistic denunciation is in inverse proportion to the amount of liberty he enjoyed before he came to this country; that it decreases in direct proportion to the length of time that he lives here and the extent to which he mingles with and becomes a part of the community; and that it tends strongly to disappear with the second generation which has had the opportunity to take in the impressions and influences of American life and education during the impressionable years of childhood. Few things

in history are more impressive and extraordinary than the force and effect of American life and institutions upon all these millions of people who have come from all parts of the earth, sprung from all races, speaking all languages, believing in all religions, and bringing with them all kinds of inherited characteristics and tendencies.

Underlying our just hopes for the future efficiency and progress of our institutions lie the sound and wholesome character of our people as shown in their daily life; the widely diffused interest in the prosperity of the country shown in the comfort of living and the opportunities for advancement among the people of all callings down to the humblest; the widespread interest to maintain the rights of property, among the owners of the farms, which according to the last census numbered 5,739,657, and among the savings-bank depositors, who in the year 1906 numbered 8,027,192, having an aggregate deposit of $3,482,137,198; the continual process of education under which during the school year ending June, 1906, there were instructed in the schools of the United States 18,434,847 scholars; the vast influence proceeding from our institutions of higher education — the universities and colleges and professional and technological schools — in which during the past year there were 210,333 students; and the freedom of religion under which all churches, separate from the state, prosper according to the measure in which they meet the religious needs of voluntary worship. More than all, our hopes must depend upon the general and active participation of the whole governing body of the American democracy in working out the problems and applying the principles of government with wisdom, with integrity, with just and kindly consideration for the rights of others — every citizen doing his full and manly duty for his country. The country's future, with its blessings or its misfortunes, with its happiness or its misery,

its progress or its decadence, depends upon all of us, and it depends upon each one of us.

I commend to you as a guide to your duty of citizenship these words of Lecky, the historian — not a rhetorician, but a discriminating and thoughtful student:

> All civic virtue, all the heroism and self-sacrifice of patriotism spring ultimately from the habit men acquire of regarding their nation as a great organic whole, identifying themselves with its fortunes in the past as in the present, and looking forward anxiously to its future destinies. When the members of any nation have come to regard their country as nothing more than the plot of ground on which they reside, and their government as a mere organization for providing police or contracting treaties; when they have ceased to entertain any warmer feelings for one another than those which private interest, or personal friendship, or a mere general philanthropy, may produce, the moral dissolution of that nation is at hand. Even in the order of material interests the well-being of each generation is in a great degree dependent upon the forbearance, self-sacrifice, and providence of those who have preceded it, and civic virtues can never flourish in a generation which thinks only of itself.

EXPERIMENTS IN GOVERNMENT

AND

THE ESSENTIALS OF THE CONSTITUTION

THE STAFFORD LITTLE LECTURES AT PRINCETON UNIVERSITY, APRIL 15 AND 16, 1913[1]

PREFACE

THE familiar saying that nothing is settled until it is settled right expresses only a half-truth. Questions of general and permanent importance are seldom finally settled. A very wise man has said that "short of the multiplication table there is no truth and no fact which must not be proved over again as if it had never been proved, from time to time." Conceptions of social rights and obligations and the institutions based upon them continue unquestioned for long periods as postulates in all discussions upon questions of government. Whatever conduct conforms to them is assumed to be right. Whatever is at variance with them is assumed to be wrong. Then a time comes when, with apparent suddenness, the ground of discussion shifts and the postulates are denied. They cease to be accepted without proof and the whole controversy in which they were originally established is fought over again.

The people of the United States appear now to have entered upon such a period of re-examination of their system of government. Not only are political parties denouncing old abuses and demanding new laws, but essential principles embodied in the Federal Constitution of 1787, and long followed in the constitutions of all the States, are questioned and denied. The wisdom of the founders of the Republic is disputed and the political ideas which they repudiated are urged for approval.

I wish in these lectures to present some observations which may have a useful application in the course of this process.[2]

[1] These lectures were delivered at Princeton University, and were published and copyrighted by the Princeton University Press in the same year. The editors acknowledge the courtesy of the Princeton University Press in permitting their republication here, and take this method of expressing their appreciation.

[2] As originally delivered, these paragraphs were the introduction to the first lecture; as published by the Princeton University Press, they form a preface.

EXPERIMENTS IN GOVERNMENT AND THE ESSENTIALS OF THE CONSTITUTION

I

EXPERIMENTS IN GOVERNMENT

THERE are two separate processes going on among the civilized nations at the present time. One is an assault by socialism against the individualism which underlies the social system of western civilization. The other is an assault against existing institutions upon the ground that they do not adequately protect and develop the existing social order. It is of this latter process in our own country that I wish to speak, and I assume an agreement, that the right of individual liberty and the inseparable right of private property which lie at the foundation of our modern civilization ought to be maintained.

The conditions of life in America have changed very much since the Constitution of the United States was adopted. In 1787 each state entering into the Federal Union had preserved the separate organic life of the original colony. Each had its center of social and business and political life. Each was separated from the others by the barriers of slow and difficult communication. In a vast territory, without railroads or steamships or telegraph or telephone, each community lived within itself.

Now, there has been a general social and industrial rearrangement. Production and commerce pay no attention to state lines. The life of the country is no longer grouped about state capitals, but about the great centers of continental production and trade. The organic growth which must ultimately determine the form of institutions has been away

from the mere union of states towards the union of individuals in the relation of national citizenship.

The same causes have greatly reduced the independence of personal and family life. In the eighteenth century life was simple. The producer and consumer were near together and could find each other. Every one who had an equivalent to give in property or service could readily secure the support of himself and his family without asking anything from government except the preservation of order. Today almost all Americans are dependent upon the action of a great number of other persons mostly unknown. About half of our people are crowded into the cities and large towns. Their food, clothes, fuel, light, water — all come from distant sources, of which they are in the main ignorant, through a vast, complicated machinery of production and distribution with which they have little direct relation. If anything occurs to interfere with the working of the machinery, the consumer is individually helpless. To be certain that he and his family may continue to live he must seek the power of combination with others, and in the end he inevitably calls upon that great combination of all citizens which we call government to do something more than merely keep the peace — to regulate the machinery of production and distribution and safeguard it from interference so that it shall continue to work.

A similar change has taken place in the conditions under which a great part of our people engage in the industries by which they get their living. Under comparatively simple industrial conditions the relation between employer and employee was mainly a relation of individual to individual with individual freedom of contract and freedom of opportunity essential to equality in the commerce of life. Now, in the great manufacturing, mining and transportation industries of the country, instead of the free give and take of

individual contract there is substituted a vast system of collective bargaining between great masses of men organized and acting through their representatives, or the individual on the one side accepts what he can get from superior power on the other. In the movement of these mighty forces of organization the individual laborer, the individual stockholder, the individual consumer, is helpless.

There has been another change of conditions through the development of political organization. The theory of political activity which had its origin approximately in the administration of President Jackson, and which is characterized by Marcy's declaration that "to the victors belong the spoils," tended to make the possession of office the primary and all-absorbing purpose of political conflict. A complicated system of party organization and representation grew up under which a disciplined body of party workers in each state supported each other, controlled the machinery of nomination, and thus controlled nominations. The members of state legislatures and other officers, when elected, felt a more acute responsibility to the organization which could control their renomination than to the electors, and therefore became accustomed to shape their conduct according to the wishes of the nominating organization. Accordingly the real power of government came to be vested to a high degree in these unofficial political organizations, and where there was a strong man at the head of an organization his control came to be something very closely approaching dictatorship. Another feature of this system aggravated its evils. As population grew, political campaigns became more expensive. At the same time, as wealth grew, corporations for production and transportation increased in capital and extent of operations and became more dependent upon the protection or toleration of government. They found a ready means to secure this by contributing heavily to the cam-

paign funds of political organizations, and therefore their influence played a large part in determining who should be nominated and elected to office. So that in many states political organizations controlled the operations of government, in accordance with the wishes of the managers of the great corporations. Under these circumstances our governmental institutions were not working as they were intended to work, and a desire to break up and get away from this extra constitutional method of controlling our constitutional government has caused a great part of the new political methods of the last few years.

It is manifest that the laws which were entirely adequate, under the conditions of a century ago, to secure individual and public welfare must be in many respects inadequate to accomplish the same results under all these new conditions; and our people are now engaged in the difficult but imperative duty of adapting their laws to the life of today. The changes in conditions have come very rapidly and a good deal of experiment will be necessary to find out just what government can do and ought to do to meet them.

The process of devising and trying new laws to meet new conditions naturally leads to the question whether we need not merely to make new laws but also to modify the principles upon which our government is based and the institutions of government designed for the application of those principles to the affairs of life. Upon this question it is of the utmost importance that we proceed with considerate wisdom.

By institutions of government I mean the established rule or order of action through which the sovereign (in our case the sovereign people) attains the ends of government. The governmental institutions of Great Britain have been established by the growth through many centuries of a great body of accepted rules and customs which, taken together, are called the British Constitution. In this country we have set

forth in the Declaration of Independence the principles which we consider to lie at the basis of civil society: " that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

In our federal and state constitutions we have established the institutions through which these rights are to be secured. We have declared what officers shall make the laws, what officers shall execute them, what officers shall sit in judgment upon claims of right under them. We have prescribed how these officers shall be selected and the tenure by which they shall hold their offices. We have limited them in the powers which they are to exercise, and, where it has been deemed necessary, we have imposed specific duties upon them. The body of rules thus prescribed constitute the governmental institutions of the United States.

When proposals are made to change these institutions there are certain general considerations which should be observed.

The first consideration is that free government is impossible except through prescribed and established governmental institutions, which work out the ends of government through many separate human agents, each doing his part in obedience to law. Popular will cannot execute itself directly except through a mob. Popular will cannot get itself executed through an irresponsible executive, for that is simple autocracy. An executive limited only by the direct expression of popular will cannot be held to responsibility against his will, because, having possession of all the powers of government, he can prevent any true, free, and general expression adverse to himself, and unless he yields voluntarily he can be overturned only by a revolution. The

familiar Spanish-American dictatorships are illustrations of this. A dictator once established by what is or is alleged to be public choice never permits an expression of public will which will displace him, and he goes out only through a new revolution because he alone controls the machinery through which he could be displaced peaceably. A system with a plebiscite at one end and Louis Napoleon at the other could not give France free government; and it was only after the humiliation of defeat in a great war and the horrors of the Commune that the French people were able to establish a government which would really execute their will through carefully devised institutions in which they gave their chief executive very little power indeed.

We should, therefore, reject every proposal which involves the idea that the people can rule merely by voting, or merely by voting and having one man or group of men to execute their will.

A second consideration is that in estimating the value of any system of governmental institutions due regard must be had to the true functions of government and to the limitations imposed by nature upon what it is possible for government to accomplish. We all know of course that we cannot abolish all the evils in this world by statute or by the enforcement of statutes, nor can we prevent the inexorable law of nature which decrees that suffering shall follow vice, and all the evil passions and folly of mankind. Law cannot give to depravity the rewards of virtue, to indolence the rewards of industry, to indifference the rewards of ambition, or to ignorance the rewards of learning. The utmost that government can do is measurably to protect men, not against the wrong they do themselves but against wrong done by others, and to promote the long, slow process of educating mind and character to a better knowledge and nobler standards of life and conduct. We know all this, but when we see

how much misery there is in the world and instinctively cry out against it, and when we see some things that government may do to mitigate it, we are apt to forget how little after all it is possible for any government to do, and to hold the particular government of the time and place to a standard of responsibility which no government can possibly meet. The chief motive power which has moved mankind along the course of development which we call the progress of civilization has been the sum total of intelligent selfishness in a vast number of individuals, each working for his own support, his own gain, his own betterment. It is that which has cleared the forests and cultivated the fields and built the ships and railroads, made the discoveries and inventions, covered the earth with commerce, softened by intercourse the enmities of nations and races, and made possible the wonders of literature and of art. Gradually, during the long process, selfishness has grown more intelligent, with a broader view of individual benefit from the common good, and gradually the influences of nobler standards of altruism, of justice, and human sympathy have impressed themselves upon the conception of right conduct among civilized men. But the complete control of such motives will be the millennium. Any attempt to enforce a millennial standard now by law must necessarily fail, and any judgment which assumes government's responsibility to enforce such a standard must be an unjust judgment. Indeed, no such standard can ever be forced. It must come, not by superior force, but from the changed nature of man, from his willingness to be altogether just and merciful.

A third consideration is that it is not merely useless but injurious for government to attempt too much. It is manifest that to enable it to deal with the new conditions I have described we must invest government with authority to interfere with the individual conduct of the citizen to a

degree hitherto unknown in this country. When government undertakes to give the individual citizen protection by regulating the conduct of others towards him in the field where formerly he protected himself by his freedom of contract, it is limiting the liberty of the citizen whose conduct is regulated and taking a step in the direction of paternal government. While the new conditions of industrial life make it plainly necessary that many such steps shall be taken, they should be taken only so far as they are necessary and are effective. Interference with individual liberty by government should be jealously watched and restrained, because the habit of undue interference destroys that independence of character without which in its citizens no free government can endure.

We should not forget that while institutions receive their form from national character they have a powerful reflex influence upon that character. Just so far as a nation allows its institutions to be moulded by its weaknesses of character rather than by its strength it creates an influence to increase weakness at the expense of strength.

The habit of undue interference by government in private affairs breeds the habit of undue reliance upon government in private affairs at the expense of individual initiative, energy, enterprise, courage, independent manhood.

The strength of self-government and the motive power of progress must be found in the characters of the individual citizens who make up a nation. Weaken individual character among a people by comfortable reliance upon paternal government and a nation soon becomes incapable of free self-government and fit only to be governed: the higher and nobler qualities of national life that make for ideals and effort and achievement become atrophied and the nation is decadent.

A fourth consideration is that in the nature of things all government must be imperfect because men are imperfect.

Every system has its shortcomings and inconveniences; and these are seen and felt as they exist in the system under which we live, while the shortcomings and inconveniences of other systems are forgotten or ignored.

It is not unusual to see governmental methods reformed and after a time, long enough to forget the evils that caused the change, to have a new movement for a reform which consists in changing back to substantially the same old methods that were cast out by the first reform.

The recognition of shortcomings or inconveniences in government is not by itself sufficient to warrant a change of system. There should be also an effort to estimate and compare the short-comings and inconveniences of the system to be substituted, for although they may be different they will certainly exist.

A fifth consideration is that whatever changes in government ought to be made, we should follow the method which undertakes as one of its cardinal points to hold fast that which is good. Francis Lieber, whose affection for the country of his birth equalled his loyalty to the country of his adoption, once said:

> There is this difference between the English, French, and Germans: that the English only change what is necessary and as far as it is necessary; the French plunge into all sorts of novelties by whole masses, get into a chaos, see that they are fools and retrace their steps as quickly, with a high degree of practical sense in all this unpracticability; the Germans attempt no change without first recurring to first principles and metaphysics beyond them, systematizing the smallest details in their minds; and when at last they mean to apply all their meditation, opportunity, with its wide and swift wings of a gull, is gone.[1]

This was written more than sixty years ago before the present French Republic and the present German Empire, and Lieber would doubtless have modified his conclusions

[1] *Life and Letters of Francis Lieber*, Edited by Thomas Sergeant Perry, Boston, 1882, p. 247, "Letter to G. S. Hillard, January 5, 1851."

in view of those great achievements in government if he were writing today. But he does correctly indicate the differences of method and the dangers avoided by the practical course which he ascribes to the English and in accordance with which the great structure of British and American liberty has been built up generation after generation and century after century. Through all the seven hundred years since Magna Charta we have been shaping, adjusting, adapting our system to the new conditions of life as they have arisen, but we have always held on to everything essentially good that we have ever had in the system. We have never undertaken to begin over again and build up a new system under the idea that we could do it better. We have never let go of Magna Charta or the Bill of Rights or the Declaration of Independence or the Constitution. When we take account of all that governments have sought to do and have failed to do in this selfish and sinful world, we find that as a rule the application of new theories of government, though devised by the most brilliant constructive genius, have availed but little to preserve the people of any considerable regions of the earth for any long periods from the evils of despotism on the one hand or of anarchy on the other, or to raise any considerable portion of the mass of mankind above the hard conditions of oppression and misery. And we find that our system of government which has been built up in this practical way through so many centuries, and the whole history of which is potent in the provisions of our Constitution, has done more to preserve liberty, justice, security, and freedom of opportunity for many people for a long period and over a great portion of the earth, than any other system of government ever devised by man. Human nature does not change very much. The forces of evil are hard to control now as they always have been. It is easy to fail and hard to succeed in reconciling liberty and order. In dealing

with this most successful body of governmental institutions the question should not be what sort of government do you or I think we should have. What you and I think on such a subject is of very little value indeed. The question should be: How can we adapt our laws and the workings of our government to the new conditions which confront us without sacrificing any essential element of this system of government which has so nobly stood the test of time and without abandoning the political principles which have inspired the growth of its institutions? For there are political principles, and nothing can be more fatal to self-government than to lose sight of them under the influence of apparent expediency.

In attempting to answer this question we need not trouble ourselves very much about the multitude of excited controversies which have arisen over new methods of extra constitutional-political organization and procedure. Direct nominations, party enrollments, instructions to delegates, presidential preference primaries, independent nominations, all relate to forms of voluntary action outside the proper field of governmental institutions. All these new political methods are the result of efforts of the rank and file of voluntary parties to avoid being controlled by the agents of their own party organization, and to get away from real evils in the form of undue control by organized minorities with the support of organized capital. None of these expedients is an end in itself. They are tentative, experimental. They are movements not towards something definite but away from something definite. They may be inconvenient or distasteful to some of us, but no one need be seriously disturbed by the idea that they threaten our system of government. If they work well they will be an advantage. If they work badly they will be abandoned and some other expedient will be tried, and the ultimate outcome will doubtless be an improvement upon the old methods.

There is another class of new methods which do relate to the structure of government and which call for more serious consideration here. Chief in this class are:

The Initiative; that is to say, direct legislation by vote of the people upon laws proposed by a specified number or proportion of the electors.

The Compulsory Referendum; that is to say, a requirement that under certain conditions laws that have been agreed upon by a legislative body shall be referred to a popular vote and become operative only upon receiving a majority vote.

The Recall of Officers before the expiration of the terms for which they have been elected, by a vote of the electors, to be had upon the demand of a specified number or proportion of them.

The Popular Review of Judicial Decisions upon constitutional questions; that is to say, a provision under which, when a court of last resort has decided that a particular law is invalid, because in conflict with a constitutional provision, the law may nevertheless be made valid by a popular vote.

Some of these methods have been made a part of the constitutional system of a considerable number of our states. They have been accompanied invariably by provisions for very short and easy changes of state constitutions, and, so long as they are confined to the particular states which have chosen to adopt them, they may be regarded as experiments which we may watch with interest, whatever may be our opinions as to the outcome, and with the expectation that if they do not work well they also will be abandoned. This is especially true because, since the adoption of the Fourteenth Amendment to the Constitution, the states are prohibited from violating in their own affairs the most important principles of the National Constitution. It is not to be expected, however, that new methods and rules of action in government shall become universal in the states and not ultimately

bring about a change in the national system. It will be useful, therefore, to consider whether these new methods if carried into the national system would sacrifice any of the essentials of that system which ought to be preserved.

The Constitution of the United States deals in the main with essentials. There are some non-essential directions such as those relating to the methods of election and of legislation, but in the main it sets forth the foundations of government in clear, simple, concise terms. It is for this reason that it has stood the test of more than a century with but slight amendment, while the modern state constitutions, into which a multitude of ordinary statutory provisions are crowded, have to be changed from year to year. The peculiar and essential qualities of the government established by the Constitution are:

First, it is representative.

Second, it recognizes the liberty of the individual citizen as distinguished from the total mass of citizens, and it protects that liberty by specific limitations upon the power of government.

Third, it distributes the legislative, executive and judicial powers, which make up the sum total of all government, into three separate departments, and specifically limits the powers of the officers in each department.

Fourth, it superimposes upon a federation of state governments, a national government with sovereignty acting directly not merely upon the states, but upon the citizens of each state, within a line of limitation drawn between the powers of the national government and the powers of the state governments.

Fifth, it makes observance of its limitations requisite to the validity of laws, whether passed by the nation or by the states, to be judged by the courts of law in each concrete case as it arises.

Every one of these five characteristics of the government established by the Constitution was a distinct advance beyond the ancient attempts at popular government, and the elimination of any one of them would be a retrograde movement and a reversion to a former and discarded type of government. In each case it would be the abandonment of a distinctive feature of government which has succeeded, in order to go back and try again the methods of government which have failed. Of course we ought not to take such a backward step except under the pressure of inevitable necessity.

The first two of the characteristics which I have enumerated, those which embrace the conception of representative government and the conception of individual liberty, were the products of the long process of development of freedom in England and America. They were not invented by the makers of the Constitution. They have been called inventions of the Anglo-Saxon race. They are the chief contributions of that race to the political development of civilization.

The expedient of representation first found its beginning in the Saxon *witenagemot*. It was lost in the Norman conquest. It was restored step by step, through the centuries in which Parliament established its power as an institution through the granting or withholding of aids and taxes for the king's use. It was brought to America by the English colonists. It was the practice of the colonies which formed the Federal Union. It entered into the Constitution as a matter of course, because it was the method by which modern liberty had been steadily growing stronger and broader for six centuries as opposed to the direct, unrepresentative method of government in which the Greek and Roman and Italian republics had failed. This representative system has in its turn impressed itself upon the nations which derived

their political ideas from Rome, and has afforded the method through which popular liberty has been winning forward in its struggle against royal and aristocratic power and privilege the world over. Bluntschli, the great Heidelberg publicist of the last century, says:

> Representative government and self-government are the great works of the English and American peoples. The English have produced representative monarchy with parliamentary legislation and parliamentary government. The Americans have produced the representative republic. We Europeans upon the Continent recognize in our turn that in representative government alone lies the hoped-for union between civil order and popular liberty.[1]

The initiative and compulsory referendum are attempts to cure the evils which have developed in our practice of representative government by means of a return to the old, unsuccessful, and discarded method of direct legislation and by rehabilitating one of the most impracticable of Rousseau's theories. Every candid student of our governmental affairs must agree that the evils to be cured have been real and that the motive which has prompted the proposal of the initiative and referendum is commendable. I do not think that these expedients will prove wise or successful ways of curing these evils for reasons which I will presently indicate; but it is not necessary to assume that their trial will be destructive of our system of government. They do not aim to destroy representative government, but to modify and control it, and were it not that the effect of these particular methods is likely to go beyond the intention of their advocates they would not interfere seriously with representative government except in so far as they might ultimately prove to be successful expedients. If they did not work satisfactorily they would be abandoned, leaving representative government still in full force and effectiveness.

[1] J. C. Bluntschli's Introduction to the *Miscellaneous Writings of Francis Lieber*, Vol. II, p. 12.

There is now a limited use of the referendum upon certain comparatively simple questions. No one has ever successfully controverted the view expressed by Burke in his letter to the electors of Bristol, that his constituents were entitled not merely to his vote but to his judgment, even though they might not agree with it. But there are some questions upon which the determining fact must be the preference of the people of the country or of a community; such as the question where a capital city or a county seat shall be located; the question whether a debt shall be incurred that will be a lien on their property for a specific purpose; the question whether the sale of intoxicating liquors shall be permitted. Upon certain great simple questions which are susceptible of a *yes* or *no* answer it is appropriate that the people should be called upon to express their wish by a vote just as they express their choice of the persons who shall exercise the powers of government by a vote. This, however, is very different from undertaking to have the ordinary powers of legislation exercised at the ballot box.

In this field the weakness, both of the initiative and of the compulsory referendum, is that they are based upon a radical error as to what constitutes the true difficulty of wise legislation. The difficulty is not to determine what ought to be accomplished but to determine how to accomplish it. The affairs with which statutes have to deal as a rule involve the working of a great number and variety of motives incident to human nature, and the working of those motives depends upon complicated and often obscure facts of production, trade, social life, with which men generally are not familiar and which require study and investigation to understand. Thrusting a rigid prohibition or command into the operation of these forces is apt to produce quite unexpected and unintended results. Moreover, we already have a great body of laws, both statutory and customary, and a

great body of judicial decisions as to the meaning and effect of existing laws. The result of adding a new law to this existing body of laws is that we get, not the simple consequence which the words, taken by themselves, would seem to require, but a resultant of forces from the new law taken in connection with all existing laws. A very large part of the litigation, injustice, dissatisfaction, and contempt for law which we deplore, results from ignorant and inconsiderate legislation with perfectly good intentions. The only safeguard against such evils and the only method by which intelligent legislation can be reached is the method of full discussion, comparison of views, modification and amendment of proposed legislation in the light of discussion and the contribution and conflict of many minds. This process can be had only through the procedure of representative legislative bodies. Representative government is something more than a device to enable the people to have their say when they are too numerous to get together and say it. It is something more than the employment of experts in legislation. Through legislative procedure a different kind of treatment for legislative questions is secured by concentration of responsibility, by discussion, and by opportunity to meet objection with amendment. For this reason the attempt to legislate by calling upon the people by popular vote to say yes or no to complicated statutes must prove unsatisfactory and on the whole injurious. In ordinary cases the voters will not and cannot possibly bring to the consideration of proposed statutes the time, attention, and knowledge required to determine whether such statutes will accomplish what they are intended to accomplish; and the vote usually will turn upon the avowed intention of such proposals rather than upon their adequacy to give effect to the intention. This would be true if only one statute were to be considered at one election; but such simplicity is not

practicable. There always will be, and if the direct system is to amount to anything there must be, many proposals urged upon the voters at each opportunity.

The measures submitted at one time in some of the western states now fill considerable volumes.

With each proposal the voter's task becomes more complicated and difficult.

Yet our ballots are already too complicated. The great blanket sheets with scores of officers and hundreds of names to be marked are quite beyond the intelligent action in detail of nine men out of ten.

The most thoughtful reformers are already urging that the voter's task be made more simple by giving him fewer things to consider and act upon at the same time.

This is the substance of what is called the Short Ballot reform; and it is right, for the more questions divide public attention the fewer questions the voters really decide for themselves on their own judgment and the greater the power of the professional politician.

There is moreover a serious danger to be apprehended from the attempt at legislation by the initiative and compulsory referendum, arising from its probable effect on the character of representative bodies. These expedients result from distrust of legislatures. They are based on the assertion that the people are not faithfully represented in their legislative bodies, but are misrepresented. The same distrust has led to the encumbering of modern state constitutions by a great variety of minute limitations upon legislative power. Many of these constitutions, instead of being simple framework of government, are bulky and detailed statutes legislating upon subjects which the people are unwilling to trust the legislature to deal with. So between the new constitutions, which exclude the legislatures from power, and the referendum, by which the people overrule what they do, and the

initiative, by which the people legislate in their place, the legislative representatives who were formerly honored, are hampered, shorn of power, relieved of responsibility, discredited, and treated as unworthy of confidence. The unfortunate effect of such treatment upon the character of legislatures and the kind of men who will be willing to serve in them can well be imagined. It is the influence of such treatment that threatens representative institutions in our country. Granting that there have been evils in our legislative system which ought to be cured, I cannot think that this is the right way to cure them. It would seem that the true way is for the people of the country to address themselves to the better performance of their own duty in selecting their legislative representatives and in holding those representatives to strict responsibility for their action. The system of direct nominations, which is easy of application in the simple proceeding of selecting members of a legislature, and the short ballot reform aim at accomplishing that result. I think that along these lines the true remedy is to be found. No system of self-government will continue successful unless the voters have sufficient public spirit to perform their own duty at the polls, and the attempt to reform government by escaping from the duty of selecting honest and capable representatives, under the idea that the same voters who fail to perform that duty will faithfully perform the far more onerous and difficult duty of legislation, seems an exhibition of weakness rather than of progress.

II

ESSENTIALS OF THE CONSTITUTION

In the first of these lectures I specified certain essential characteristics of our system of government, and discussed the preservation of the first — its representative character. The four other characteristics specified have one feature in common. They all aim to preserve rights by limiting power.

Of these the most fundamental is the preservation in our Constitution of the Anglo-Saxon idea of individual liberty. The republics of Greece and Rome had no such conception. All political ideas necessarily concern man as a social animal, as a member of society — a member of the state. The ancient republics, however, put the state first and regarded the individual only as a member of the state. They had in view the public rights of the state in which all its members shared, and the rights of the members as parts of the whole, but they did not think of individuals as having rights independent of the state, or against the state. They never escaped from the attitude towards public and individual civil rights, which was dictated by the original and ever-present necessity of military organization and defense.

The Anglo-Saxon idea, on the other hand, looked first to the individual. In the early days of English history, without theorizing much upon the subject, the Anglo-Saxons began to work out their political institutions along the line expressed in our Declaration of Independence, that the individual citizen has certain inalienable rights — the right to life, to liberty, to the pursuit of happiness, and that government is not the source of these rights, but is the instrument for the preservation and promotion of them. So when a century and a half after the Conquest the barons of England set themselves to limit the power of the crown they did not

demand a grant of rights. They asserted the rights of individual freedom and demanded observance of them, and they laid the corner stone of our system of government in this solemn pledge of the Great Charter:

> No freeman shall be taken, or imprisoned, or be disseized of his freehold, or his liberties, or his free customs, or be outlawed, or exiled, or otherwise destroyed, but by the lawful judgment of his peers, or by the law of the land.

Again and again in the repeated confirmations of the Great Charter, in the Petition of Rights, in the Habeas Corpus Act, in the Bill of Rights, in the Massachusetts Body of Liberties, in the Virginia Bill of Rights, and, finally, in the immortal Declaration of 1776 — in all the great utterances of striving for broader freedom which have marked the development of modern liberty, sounds the same dominant note of insistence upon the inalienable right of individual manhood under government but independent of government, and, if need be, against government, to life and liberty.

It is impossible to overestimate the importance of the consequences which followed from these two distinct and opposed theories of government. The one gave us the dominion, but also the decline and fall, of Rome. It followed the French Declaration of the Rights of Man, with the negation of those rights in the oppression of the Reign of Terror, the despotism of Napoleon, the popular submission to the Second Empire and the subservience of the individual citizen to official superiority which still prevails so widely on the continent of Europe. The tremendous potency of the other subdued the victorious Normans to the conquered Saxon's conception of justice, rejected the claims of divine right by the Stuarts, established capacity for self-government upon the independence of individual character that knows no superior but the law, and supplied the amazing formative power which has moulded, according to the course and practice

of the common law, the thought and custom of the hundred millions of men drawn from all lands and all races who inhabit this continent north of the Rio Grande.

The mere declaration of a principle, however, is of little avail unless it be supported by practical and specific rules of conduct through which the principle shall receive effect. So Magna Charta imposed specific limitations upon royal authority to the end that individual liberty might be preserved, and so to the same end our Declaration of Independence was followed by those great rules of right conduct which we call the limitations of the Constitution. Magna Charta imposed its limitations upon the kings of England and all their officers and agents. Our Constitution imposed its limitations upon the sovereign people and all their officers and agents, excluding all the agencies of popular government from authority to do the particular things which would destroy or impair the declared inalienable right of the individual.

Thus the Constitution provides: No law shall be made by Congress prohibiting the free exercise of religion, or abridging the freedom of speech or of the press. The right of the people to keep and bear arms shall not be infringed. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; and to be informed of the nature and cause of the accusation, to

be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion. No bill of attainder or *ex post facto* law shall be passed. And by the Fourteenth Amendment, no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

We have lived so long under the protection of these rules that most of us have forgotten their importance. They have been unquestioned in America so long that most of us have forgotten the reasons for them. But if we lose them we shall learn the reasons by hard experience. And we are in some danger of losing them, not all at once but gradually, by indifference.

As Professor Sohm says, "The greatest and most far-reaching revolutions in history are not consciously observed at the time of their occurrence." [1]

Every one of these provisions has a history. Every one stops a way through which the overwhelming power of government has oppressed the weak individual citizen, and may do so again if the way be opened. Such provisions as these are not mere commands. They withhold power. The instant any officer, of whatever kind or grade, transgresses them he ceases to act as an officer. The power of sovereignty no longer supports him. The majesty of the law no longer gives him authority. The shield of the law no longer protects him. He becomes a trespasser, a despoiler, a law-breaker, and all the machinery of the law may be set in

[1] *The Institutes*, by Rudolph Sohm, professor of German law in the University of Leipzig, translated by James Crawford Ledlie, 2d ed., Oxford, 1901, p. 42.

motion for his restraint or punishment. It is true that the people who have made these rules may repeal them. As restraints upon the people themselves they are but self-denying ordinances which the people may revoke, but the supreme test of capacity for popular self-government is the possession of that power of self-restraint through which a people can subject its own conduct to the control of declared principles of action.

These rules of constitutional limitation differ from ordinary statutes in this, that these rules are made impersonally, abstractly, dispassionately, impartially, as the people's expression of what they believe to be right and necessary for the preservation of their idea of liberty and justice. The process of amendment is so guarded by the Constitution itself as to require lapse of time and opportunity for deliberation and consideration and the passing away of disturbing influences which may be caused by special exigencies or excitements before any change can be made. On the contrary, ordinary acts of legislation are subject to the considerations of expediency for the attainment of the particular objects of the moment, to selfish interests, momentary impulses, passions, prejudices, temptations. If there be no general rules which control particular action, general principles are obscured or set aside by the desires and impulses of the occasion. Our knowledge of the weakness of human nature and countless illustrations from the history of legislation in our own country point equally to the conclusion that if governmental authority is to be controlled by rules of action, it cannot be relied upon to impose those rules upon itself at the time of action, but must have them prescribed for it beforehand.

The second class of limitations upon official power provided in our Constitution prescribe and maintain the distribution of power to the different departments of government

and the limitations upon the officers invested with authority in each department. This distribution follows the natural and logical lines of the distinction between the different kinds of power — legislative, executive, and judicial. But the precise allotment of power and lines of distinction are not so important as it is that there shall be distribution, and that each officer shall be limited in accordance with that distribution, for without such limitations there can be no security for liberty. If, whatever great officer of state happens to be the most forceful, skillful, and ambitious, is permitted to overrun and absorb to himself the powers of all other officers and to control their action, there ensues that concentration of power which destroys the working of free institutions, enables the holder to continue himself in power, and leaves no opportunity to the people for a change except through a revolution. Numerous instances of this very process are furnished by the history of some of the Spanish-American republics. It is of little consequence that the officer who usurps the power of others may design only to advance the public interest and to govern well. The system which permits an honest and well-meaning man to do this will afford equal opportunity for selfish ambition to usurp power in its own interest. Unlimited official power concentrated in one person is despotism, and it is only by carefully observed and jealously maintained limitations upon the power of every public officer that the workings of free institutions can be continued.

The rigid limitation of official power is necessary not only to prevent the deprivation of substantial rights by acts of oppression, but to maintain that equality of political condition which is so important for the independence of individual character among the people of the country. When an officer has authority over us only to enforce certain specific laws at particular times and places, and has no authority regarding

anything else, we pay deference to the law which he represents, but the personal relation is one of equality. Give to that officer, however, unlimited power, or power which we do not know to be limited, and the relation at once becomes that of an inferior to a superior. The inevitable result of such a relation long continued is to deprive the people of the country of the individual habit of independence. This may be observed in many of the countries of Continental Europe, where official persons are treated with the kind of deference, and exercise the kind of authority, which are appropriate only to the relations between superior and inferior.

So the Massachusetts Constitution of 1780, after limiting the powers of each department to its own field, declares that this is done " to the end it may be a government of laws and not of men."

The third class of limitations I have mentioned are those made necessary by the novel system which I have described as superimposing upon a federation of state governments, a national government acting directly upon the individual citizens of the states. This expedient was wholly unknown before the adoption of our Constitution. All the confederations which had been attempted before that time were simply leagues of states, and whatever central authority there was derived its authority from and had its relations with the states as separate bodies politic. This was so of the old confederation. Each citizen owed his allegiance to his own state and each state had its obligations to the confederation. Under our constitutional system in every part of the territory of every state there are two sovereigns, and every citizen owes allegiance to both sovereigns — to his state and to his nation. In regard to some matters, which may generally be described as local, the state is supreme. In regard to other matters, which may generally be described as national, the nation is supreme. It is plain that to maintain the line

between these two sovereignties operating in the same territory and upon the same citizens is a matter of no little difficulty and delicacy. Nothing has involved more constant discussion in our political history than questions of conflict between these two powers and we fought the great Civil War to determine the question whether in case of conflict the allegiance to the state or the allegiance to the nation was of superior obligation. We should observe that the Civil War arose because the Constitution did not draw a clear line between the national and state powers regarding slavery. It is of very great importance that both of these authorities, state and national, shall be preserved together and that the limitations which keep each within its proper province shall be maintained. If the power of the states were to override the power of the nation we should ultimately cease to have a nation and become only a body of really separate, although confederated, state sovereignties continually forced apart by diverse interests and ultimately quarreling with each other and separating altogether. On the other hand, if the power of the nation were to override that of the states and usurp their functions we should have this vast country, with its great population, inhabiting widely separated regions, differing in climate, in production, in industrial and social interests and ideas, governed in all its local affairs by one all-powerful, central government at Washington, imposing upon the home life and behavior of each community the opinions and ideas of propriety of distant majorities. Not only would this be intolerable and alien to the idea of free self-government, but it would be beyond the power of a central government to do directly. Decentralization would be made necessary by the mass of government business to be transacted, and so our separate localities would come to be governed by delegated authority — by proconsuls authorized from Washington to execute the will of the great majority of the whole people.

No one can doubt that this also would lead by its different route to the separation of our Union. Preservation of our dual system of government, carefully restrained in each of its parts by the limitations of the Constitution, has made possible our growth in local self-government and national power in the past, and, so far as we can see, it is essential to the continuance of that government in the future.

All of these three classes of constitutional limitations are therefore necessary to the perpetuity of our government. I do not wish to be understood as saying that every single limitation is essential. There are some limitations that might be changed and something different substituted. But the system of limitation must be continued if our governmental system is to continue — if we are not to lose the fundamental principles of government upon which our Union is maintained and upon which our race has won the liberty secured by law for which it has stood foremost in the world.

Lincoln covered this subject in one of his comprehensive statements that cannot be quoted too often. He said in the first inaugural:

> A majority held in restraint by constitutional checks and limitations and always changing easily with deliberate changes of popular opinion and sentiment is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Rules of limitation, however, are useless unless they are enforced. The reason for restraining rules arises from a tendency to do the things prohibited. Otherwise no rule would be needed. Against all practical rules of limitation — all rules limiting official conduct, there is a constant pressure from one side or the other. Honest differences of opinion as to the extent of power, arising from different points of view make this inevitable, to say nothing of those weaknesses and faults of human nature which lead men to press the exercise of power to the utmost under the influence of ambition, of

impatience with opposition to their designs, of selfish interest and the arrogance of office. No mere paper rules will restrain these powerful and common forces of human nature. The agency by which, under our system of government, observance of constitutional limitation is enforced is the judicial power. The Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Under this provision an enactment by Congress not made in pursuance of the Constitution, or an enactment of a state contrary to the Constitution, is not a law. Such an enactment should strictly have no more legal effect than the resolution of any private debating society. The Constitution also provides that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution and laws of the United States. Whenever, therefore, in a case before a federal court rights are asserted under or against some law which is claimed to violate some limitation of the Constitution the court is obliged to say whether the law does violate the Constitution or not, because if it does not violate the Constitution the court must give effect to it as law, while if it does violate the Constitution it is no law at all and the court is not at liberty to give effect to it. The courts do not render decisions like imperial rescripts declaring laws valid or invalid. They merely render judgment on the rights of the litigants in particular cases, and in arriving at their judgment they refuse to give effect to statutes which they find clearly not to be made in pursuance of the Constitution and therefore to be no laws at all. Their judgments are technically binding only in the particular case decided,

but the knowledge that the court of last resort has reached such a conclusion concerning a statute, and that a similar conclusion would undoubtedly be reached in every case of an attempt to found rights upon the same statute, leads to a general acceptance of the invalidity of the statute.

There is only one alternative to having the courts decide upon the validity of legislative acts, and that is by requiring the courts to treat the opinion of the legislature upon the validity of its statutes, evidenced by their passage, as conclusive. But the effect of this would be that the legislature would not be limited at all except by its own will. All the provisions designed to maintain a government carried on by officers of limited powers, all the distinctions between what is permitted to the national government and what is permitted to the state governments, all the safeguards of the life, liberty and property of the citizen against arbitrary power, would cease to bind Congress, and on the same theory they would cease also to bind the legislatures of the states. Instead of the Constitution being superior to the laws the laws would be superior to the Constitution, and the essential principles of our government would disappear. More than one hundred years ago, Chief Justice Marshall, in the great case of Marbury *v.* Madison,[1] set forth the view upon which our government has ever since proceeded. He said:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

[1] 1 Cranch, pp. 137, 176–177.

Between these alternatives, there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society.

And of the same opinion was Montesquieu who gave the high authority of the *Esprit des lois* to the declaration that

There is no liberty if the power of judging be not separate from the legislative and executive powers; were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control.[1]

It is to be observed that the wit of man has not yet devised any better way of reaching a just conclusion as to whether a statute does or does not conflict with a constitutional limitation upon legislative power than the submission of the question to an independent and impartial court. The courts are not parties to the transactions upon which they pass. They are withdrawn by the conditions of their office from participation in business and political affairs out of which litigations arise. Their action is free from the chief dangers which threaten the undue extension of power, because, as Hamilton points out in *The Federalist*, they are the weakest branch of government: they neither hold the purse, as does the legislature, nor the sword, as does the executive. During all our history they have commanded and deserved the respect and confidence of the people. General acceptance

[1] *Esprit des lois*, by Charles Louis de Secondat Montesquieu, Vol. I, p. 181.

of their conclusions has been the chief agency in preventing here the discord and strife which afflict so many lands, and in preserving peace and order and respect for law.

Indeed in the effort to emasculate representative government to which I have already referred, the people of the experimenting states have greatly increased their reliance upon the courts. Every new constitution with detailed orders to the legislature is a forcible assertion that the people will not trust legislatures to determine the extent of their own powers, but will trust the courts.

Two of the new proposals in government which have been much discussed, directly relate to this system of constitutional limitations made effective through the judgment of the courts. One is the proposal for the recall of judges, and the other for the popular review of decisions, sometimes spoken of as the recall of decisions.

Under the first of these proposals, if a specified proportion of the voters are dissatisfied with a judge's decision they are empowered to require that at the next election, or at a special election called for that purpose, the question shall be presented to the electors whether the judge shall be permitted to continue in office or some other specified person shall be substituted in his place. This ordeal differs radically from the popular judgment which a judge is called upon to meet at the end of his term of office, however short that may be, because when his term has expired he is judged upon his general course of conduct while he has been in office and stands or falls upon that as a whole. Under the recall a judge may be brought to the bar of public judgment immediately upon the rendering of a particular decision which excites public interest and he will be subject to punishment if that decision is unpopular. Judges will naturally be afraid to render unpopular decisions. They will hear and decide cases with a stronger incentive to avoid condemnation them-

selves than to do justice to the litigant or the accused. Instead of independent and courageous judges we shall have timid and time-serving judges. That highest duty of the judicial power to extend the protection of the law to the weak, the friendless, the unpopular, will in a great measure fail. Indirectly the effect will be to prevent the enforcement of the essential limitations upon official power because the judges will be afraid to declare that there is a violation when the violation is to accomplish some popular object.

The recall of decisions aims directly at the same result. Under such an arrangement, if the courts have found a particular law to be a violation of one of the fundamental rules of limitation prescribed in the Constitution, and the public feeling of the time is in favor of disregarding that limitation in that case, an election is to be held, and if the people in that election vote that the law shall stand, it is to stand, although it be a violation of the Constitution; that is to say, if at any time a majority of the voters of a state (and ultimately the same would be true of the people of the United States) choose not to be bound in any particular case by the rule of right conduct which they have established for themselves, they are not to be bound. This is sometimes spoken of as a popular reversal of the decisions of courts. That I take to be an incorrect view. The power which would be exercised by the people under such an arrangement would be, not judicial, but legislative. The action would not be a decision that the court was wrong in finding a law unconstitutional, but it would be making a law valid which was invalid before because unconstitutional. In such an election the majority of the voters would make a law where no law had existed before; and they would make that law in violation of the rules of conduct by which the people themselves had solemnly declared they ought to be bound. The exercise of such a power, if it is to exist, cannot be limited to the

particular cases which you or I or any man now living may have in mind. It must be general. If it can be exercised at all it can and will be exercised by the majority whenever they wish to exercise it. If it can be employed to make a workmen's compensation act in such terms as to violate the Constitution, it can be employed to prohibit the worship of an unpopular religious sect, or to take away the property of an unpopular rich man without compensation, or to prohibit freedom of speech and of the press in opposition to prevailing opinion, or to deprive one accused of crime of a fair trial when he has been condemned already by the newspapers. In every case the question whether the majority shall be bound by those general principles of action which the people have prescribed for themselves will be determined in that case by the will of the majority, and therefore in no case will the majority be bound except by its own will at the time.

The exercise of such a power would strike at the very foundation of our system of government. It would be a reversion to the system of the ancient republics where the state was everything and the individual nothing except as a part of the state, and where liberty perished. It would be a repudiation of the fundamental principle of Anglo-Saxon liberty which we inherit and maintain, for it is the very soul of our political institutions that they protect the individual against the majority. "All men," says the Declaration, "are endowed by their Creator with certain unalienable Rights." Governments are instituted to secure these rights. The rights are not derived from any majority. They are not disposable by any majority. They are superior to all majorities. The weakest minority, the most despised sect, exist by their own right. The most friendless and lonely human being on American soil holds his right to life and liberty and the pursuit of happiness, and all that goes to make them up, by

title indefeasible against the world, and it is the glory of American self-government that by the limitations of the Constitution we have protected that right against even ourselves.

That protection cannot be continued and that right cannot be maintained, except by jealously preserving at all times and under all circumstances the rule of principle which is eternal over the will of majorities which shift and pass away.

Democratic absolutism is just as repulsive, and history has shown it to be just as fatal, to the rights of individual manhood as is monarchical absolutism.

But it is not necessary to violate the rules of action which we have established for ourselves in the Constitution in order to deal by law with the new conditions of the time, for these rules of action are themselves subject to popular control. If the rules are so stated that they are thought to prevent the doing of something which is not contrary to the principles of liberty but demanded by them, the true remedy is to be found in reconsidering what the rules ought to be and, if need be, in restating them so that they will give more complete effect to the principles they are designed to enforce. If, as I believe, there ought to be in my own state, for example, a workman's compensation act to supersede the present unsatisfactory system of accident litigation, and if the Constitution forbids such a law — which I very much doubt — the true remedy is not to cast to the winds all systematic self-restraint and to inaugurate a new system of doing whatever we please whenever we please, unrestrained by declared rules of conduct; but it is to follow the orderly and ordinary method of amending the Constitution so that the rule protecting the right to property shall not be so broadly stated as to prevent legislation which the principle underlying the rule demands.

The difference between the proposed practice of overriding the Constitution by a vote and amending the Constitution is

vital. It is the difference between breaking a rule and making a rule; between acting without any rule in a particular case and determining what ought to be the rule of action applicable to all cases.

Our legislatures frequently try to evade constitutional provisions, and doubtless popular majorities seeking specific objects would vote the same way; but set the same people to consider what the fundamental law ought to be, and confront them with the question whether they will abandon in general the principles and the practical rules of conduct according to principles, upon which our government rests, and they will instantly refuse. While their minds are consciously and avowedly addressed to that subject they will stand firm for the general rules that will protect them and their children against oppression and usurpation, and they will change those rules only if need be to make them enforce more perfectly the principles which underlie them.

Communities, like individuals, will declare for what they believe to be just and right; but communities, like individuals, can be led away from their principles step by step under the temptations of specific desires and supposed expediencies until the principles are a dead letter and allegiance to them is a mere sham.

And that is the way in which popular governments lose their vitality and perish.

The Roman consuls derived their power from the people and were responsible to the people; but Rome went on pretending that the emperors and their servants were consuls long after the prætorians were the only source of power and the only power exercised was that of irresponsible despotism.

A number of countries have copied our Constitution coupled with a provision that the constitutional guarantees may be suspended in case of necessity. We are all familiar with the result. The guarantees of liberty and justice and

order have been forgotten: the government is dictatorship and the popular will is expressed only by revolution.

Nor, so far as our national system is concerned has there yet appeared any reason to suppose that suitable laws to meet the new conditions cannot be enacted without either overriding or amending the Constitution. The liberty of contract and the right of private property which are protected by the limitations of the Constitution are held subject to the police power of government to pass and enforce laws for the protection of the public health, public morals, and public safety. The scope and character of the regulations required to accomplish these objects vary as the conditions of life in the country vary. Many interferences with contract and with property which would have been unjustifiable a century ago are demanded by the conditions which exist now and are permissible without violating any constitutional limitation. What will promote these objects the legislative power decides with large discretion, and the courts have no authority to review the exercise of that discretion. It is only when laws are passed under color of the police power and having no real or substantial relation to the purposes for which the power exists, that the courts can refuse to give them effect.

By a multitude of judicial decisions in recent years our courts have sustained the exercise of this vast and progressive power in dealing with the new conditions of life under a great variety of circumstances. The principal difficulty in sustaining the exercise of the power has been caused ordinarily by the fact that carelessly or ignorantly drawn statutes either have failed to exhibit the true relation between the regulation proposed and the object sought, or have gone farther than the attainment of the legitimate object justified. A very good illustration of this is to be found in the federal employer's liability act which was carelessly

drawn and passed by Congress in 1906 and was declared unconstitutional by the Supreme Court, but which was carefully drawn and passed by Congress in 1908 and was declared constitutional by the same court.

Insistence upon hasty and violent methods rather than orderly and deliberate methods is really a result of impatience with the slow methods of true progress in popular government. We should probably make little progress were there not in every generation some men who, realizing evils, are eager for reform, impatient of delay, indignant at opposition, and intolerant of the long, slow processes by which the great body of the people may consider new proposals in all their relations, weigh their advantages and disadvantages, discuss their merits, and become educated either to their acceptance or rejection. Yet that is the method of progress in which no step, once taken, needs to be retraced; and it is the only way in which a democracy can avoid destroying its institutions by the impulsive substitution of novel and attractive but impracticable expedients.

The wisest of all the Fathers of the Republic has spoken, not for his own day alone but for all generations to come after him, in the solemn admonitions of the Farewell Address. It was to us that Washington spoke when he said:

> The basis of our political systems is the right of the people to make and to alter their constitutions of government; but the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. . . . Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions; that experience is the surest standard by which to

test the real tendency of the existing constitution of a country; that facility in changes, upon the credit of mere hypothesis and opinion, exposes to perpetual changes, from the endless variety of hypothesis and opinion.

While, in the nature of things, each generation must assume the task of adapting the working of its government to new conditions of life as they arise, it would be the folly of ignorant conceit for any generation to assume that it can lightly and easily improve upon the work of the founders in those matters which are, by their nature, of universal application to the permanent relations of men in civil society.

Religion, the philosophy of morals, the teaching of history, the experience of every human life, point to the same conclusion — that in the practical conduct of life the most difficult and the most necessary virtue is self-restraint. It is the first lesson of childhood; it is the quality for which great monarchs are most highly praised; the man who has it not is feared and shunned; it is needed most where power is greatest; it is needed more by men acting in a mass than by individuals, because men in the mass are more irresponsible and difficult of control than individuals. The makers of our Constitution, wise and earnest students of history and of life, discerned the great truth that self-restraint is the supreme necessity and the supreme virtue of a democracy. The people of the United States have exercised that virtue by the establishment of rules of right action in what we call the limitations of the Constitution, and until this day they have rigidly observed those rules. The general judgment of students of government is that the success and permanency of the American system of government are due to the establishment and observance of such general rules of conduct. Let us change and adapt our laws as the shifting conditions of the times require, but let us never abandon or weaken this fundamental and essential characteristic of our ordered liberty.

NEW YORK STATE CONSTITUTIONAL CONVENTIONS OF 1894 AND 1915

The first constitution of the state of New York was adopted on April 20, 1777. Since that date, the state has had three separate and distinct constitutions, and six constitutional conventions: 1801, 1821, 1846, 1867, 1894, and 1915. The second constitution, framed by the constitutional convention, was adopted in 1821. The third constitution, adopted in 1846, and ratified by the people, provided for a constitutional convention to be held every twenty years thereafter, and required the legislature to submit the question of holding a convention to a vote of the people. The convention of 1867 adopted a constitution, which was defeated at the polls. The Honorable David B. Hill, then governor, vetoed the bill providing for a constitutional convention in 1887. In 1894, the fifth constitutional convention drafted various amendments to the constitution, and the constitution as thus amended was submitted to and approved by the people. The sixth constitutional convention, held in 1915, proposed many important and far-reaching amendments, and the constitution with these amendments, was submitted to the people on November 2, and was defeated.

In legislative bodies bills introduced often fail of enactment because they are at the time of their introduction in advance of public sentiment; but eventually they are placed upon the statute books. In constitutional conventions it likewise happens that proposals involving fundamental changes are approved by the convention, but are defeated at the polls. But, as is the case in legislative assemblies, they again make their appearance and are finally embodied in the constitution.

Honorable Joseph H. Choate was president of the convention of 1894 and Mr. Root was chairman of the Judiciary Committee and the floor leader of the majority.

Mr. Root was elected president of the New York constitutional convention of 1915. As presiding officer, he frequently took part in the general debates of the convention, regarding whose work he said in an address contained in the present volume, " We are performing the highest and most sacred duty that civilization demands from man."

The spirit in which Mr. Root approached the performance of his duties is shown by the following prayer which he made on May 5, 1915, in the absence of the chaplain:

> Almighty God, we pray to Thee to guide our deliberations this day. Make us humble, sincere, devoted to the public service. Make us wise, considerate of the feelings and the opinions and the rights of others. Make us effective and useful for the advancement of Thy cause of peace and justice and liberty in the world. For Christ's sake. Amen.

THE CONVENTION OF 1894

As the floor leader of the convention of 1894, Mr. Root made many speeches in that body, a large portion of which had to do with the procedure of the convention, while others were explanatory in their character. From the remainder, five speeches are selected, dealing with important questions and phases of government.

TRIAL BY JURY

ADDRESS OF JULY 17, 1894

The Convention having under consideration the following report from the Committee on Judiciary:

> The Committee on Judiciary, to which has been referred the proposed constitutional amendments, relating to the subject of trial by jury, respectfully reports, four members dissenting, that it has fully considered the proposed amendments, and that in the judgment of the committee no amendments should be made to the provisions of the existing constitution relating to that subject:

Mr. Root said:

I WISH to make a very few observations upon the merits of this report.

I apprehend that it is not the function of this convention to evolve a constitution out of theory or from first principles, irrespective of the existing condition of things. That is not the American or the Anglo-Saxon method of legislation. It is the French method, which has given to them within the last century many constitutions, none of which has been permanent. Our method is to proceed cautiously, slowly, holding on to that which is good, and changing only when we are certain that a change will be an improvement.

Now, sir, the fundamental idea of this report is that while there were many things which led the people of this state to order the convening of their delegates for the purpose of revising and amending the constitution, a discontent with the system of trial by jury was not one of those things. We

did not believe — I do not now believe, notwithstanding the very able and forceful addresses which have been made tonight, — that the people of the state of New York are dissatisfied with their time-honored institution of trial by jury. I am not dissatisfied with it, sir. I believe that it is one of the most important, most vital, most sacred of the institutions which maintain our free and popular government. I believe that it serves to bring the people — not lawyers and judges, but the plain people — who vote, and who underlie the whole structure of our government, into immediate participation in the administration of law. I believe that it mitigates the severe logic of the law, and makes its administration tolerable. I believe that it reaches correct results in fact and in reason, though not always by logic; and I believe, sir, that the very essential feature of this system is the requirement of unanimity. I think that the amendment which aims at permitting less than the entire body of the jury to render a verdict, is aimed at the very heart of the jury system, and is nothing short of revolution. Now, sir, believing that, we could do nothing else than report against this amendment, even though we were in doubt, even though it might seem to you and to me, even to a majority of this convention, that if we were to frame a constitution anew upon theoretic principles, nevertheless we would require overwhelming evidence that our new idea was the best, before we should venture without any evidence of great popular discontent with what exists, without any evidence of a great popular demand for a radical change in the established institution, to set out upon a new and untried experiment, relating to the most vital matter in the administration of the law.

I say most vital, because this is where the people are concerned in the administration of the law. It is the muniment of their title to control of that administration. It is the

means by which they protect themselves against power, against wealth, and against the judge on the bench. I am not surprised that we should have expressions from judges which tend in derogation of the system of trial by jury, for the system of trial by jury was designed and has served always as a protection against judges; and the time comes often and again when the people need that protection, when individual liberty needs that protection; and I will never consent, if I vote alone, against overwhelming majorities, to take away one jot or tittle of the strength, the stability and the perpetuity of that safeguard.

I do not believe, sir, that the people of this state will ever consent to it. I hope they never will.

Mr. President, I have said all that I have to say, with one exception: We have had read to us tonight a number of expressions of opinion from text-writers, from jurists, from learned judges, in England, in Illinois, in Michigan, in Iowa, and in New York; but in England, in Illinois, in Michigan, in Iowa, in New York, there still remains the system of trial by jury, with its essential characteristic of a unanimous verdict. Theory is against it, Mr. President, but the plain practical common sense of the Anglo-Saxon race has wrought out and holds to, and I believe means to hold to this their peculiar method of conciliating disputes and of ending litigation. The plain sense of the people, through hundreds of years in practical experiment, sets itself still against the theories of jurists. The plain sense of the people will have to pass upon this revised and amended constitution. Not theorists, not jurists, not text-writers. To the people we must appeal, and let us apply their good common sense to the work which we do. I hope, Mr. President, that this convention will not attack the system of trial by jury.

THE JUDICIARY

ADDRESS OF AUGUST 20, 1894

It is exceedingly difficult and yet necessary to draw the line in the Union and in the states between original and appellate jurisdiction of courts of justice. The Committee on the Judiciary of the Constitutional Convention of New York of 1894, of which Mr. Root was the chairman, dealt with this question. After much thought and reflection, the Committee presented a report, drafted by Mr. Root, drawing this distinction.

In presenting the Judiciary Article to the convention, Mr. Root made the address which follows. The whole article, consisting of twenty-three sections, was adopted by the convention practically in the form in which it was presented by Mr. Root; it was submitted to the people of the state with the remainder of the constitution at the November election of 1894, and was adopted. With certain amendments which have since been adopted, it is now a part of the organic law of the state.

IF the members of the convention will bear with me for a few minutes, I would like to explain the general scheme of reform in the judicial system of the state which is proposed by the judiciary committee. The two main evils which manifestly require treatment by this convention, so far as the judicial system is concerned, are the great delay in bringing causes to trial, in the first instance, and the great delay in securing the final disposition of causes because of the overcrowding of the calendar of the Court of Appeals. The proposed article is designed in the best way which the committee could devise to meet these two evils. So far as the first is concerned, that is to say, the overcrowding of calendars of courts of first instance, the cure is simple. It is, to bring about as great an economy of judicial force in the trial courts as possible, and to make a sufficient number of additions to those courts to enable a suitor to have his case tried at the earliest possible day. The overcrowding of calendars of trial courts exists chiefly in the great cities. It is worst in the city

of New York. Next to that comes the city of Brooklyn, and so on through the other cities of the state, almost in proportion to their size. The committee has proposed in this article to dispose of this evil, in the first place, by consolidating with the Supreme Court the Superior City Courts which exist in the cities of New York, Brooklyn and Buffalo. At present, in the city of New York, there is the Supreme Court, with its jury terms, which we call circuits, its special terms for the trial of equity causes, its chambers for the hearing of motions, and its general term for the hearing of appeals. There is also the Court of Common Pleas, with a like array of jury terms and special terms and chambers and general terms. Then there is the Superior Court, with a similar array of different parts, and, in the midst of these, with three general terms and a great number of special terms, and three judges sitting in chambers, and a great number of jury terms, judges assigned for particular terms run out of business and have nothing to do. A great deal of time is occupied in this machinery of judicial procedure, multiplied over and over again in the different courts. We think there will be a very decided economy of judicial force arising from the consolidation of these courts. The other evil is the overcrowding of the calendar of the Court of Appeals, and we have treated that with a view to the functions of a court of last resort and of intermediate courts of appeal. It is apparent that when the state has furnished to its citizens one trial of their rights and one impartial review of the rulings and results of that trial by a competent tribunal, it has fulfilled its duty. That is all that is done in the other states of the Union. It is all that is done under the system of the Federal judiciary. One trial by a competent court and one review by a competent and impartial tribunal is all that either public duty or private interest in litigation requires, so far as the litigant himself is concerned. There is no reason for having a court of appeals

superior to the courts which in the first instance review judgments of the trial courts in this state, except for the consideration which I will now state. It is, that the amount of judicial business in this state is so great that it is impossible for any one court to review all the decisions of courts of first instance. It would be impossible for any two courts to review them all, or for any three courts, probably. So in order that litigants may have the hasty rulings of the trial courts reviewed, it is necessary that we should have three or four appellate courts to perform that function. But, three or four courts never can settle the law, and it is of the highest importance to the people of the state, and all the people of the state, not merely that the litigant in a particular lawsuit shall have his right, but that the law shall be settled; that it shall be declared so clearly that all the people may know what is the law by which they are to regulate their contracts and their conduct and keep out of litigation, if may be, so that there may be a symmetrical and harmonious system for the government of the people of the state as well as for according specific rights to the parties in particular litigations. Now, three or four courts can never accomplish that. They are certain to vary and differ and conflict in their decisions. It is necessary, in order that the law shall be settled, shall be clear, shall be known, and shall be a guide for the conduct of all the people of the state, that some one supreme authority shall supervise the decisions of these various courts of original appeal, and finally declare what is the law. That is the sole reason for the existence of the Court of Appeals. But for that we might abolish the Court of Appeals, and constitute four supreme appellate tribunals in different parts of the state, and allow them to render to litigants their rights in their particular litigations. When the Judiciary Article of 1867 was adopted it was supposed that the Court of Appeals, as then constituted, would be able to review all

of the decisions of the general terms of the Supreme Court then constituted. That was so for a time, but of late years it is no longer so. Various circumstances connected with the organization and action of the general terms have brought about a state of affairs in which so large a body of appeals passes through those courts on to the Court of Appeals that that court no longer can keep up with its work and perform the function of settling and declaring the law of the state; and with this view we addressed ourselves to ascertain whether it was not possible so to constitute the intermediate appellate tribunal which we have heretofore called the general term, and so regulate the appeals from its judgments to the Court of Appeals that it would perform the function which it was originally designed to perform. We found among the reasons why the general terms are not able to stop the great body of appeals to the Court of Appeals, these: In the first place, the general term is so small, consisting of only three members, that there is not that consultation, that deliberation, that correction of one mind by another which is necessary for the satisfactory conclusions of an appellate tribunal. In the next place, as the justices of the general term are engaged in the ordinary judicial work, trying and deciding cases, and, in many instances, doing their full share of trial work, in numerous cases litigants coming before that court find that one of the judges is obliged to retire from the bench during an appeal from his own decision. And a double evil has resulted. First, that there are but two judges to pass upon the appeal — a number manifestly insufficient to secure full consultation and correction of one judgment by another. And another evil is that litigants are obliged to see the very judge from whom they are appealing going into the consultation room with the other two judges who are his associates, and upon whose decisions he is about, in the due course of the call of the

calendar, to sit in review, for consultation on all the general business of the court.

And both of these have tended to decrease respect for the judgments of the general terms. Moreover, the fact that these judges in the general terms are called upon to leave that work to go to their circuits and to their special terms has led to the shortening of their hearings and to cutting down the time allowed counsel, so that counsel have been in the habit, in many places, of uniformly leaving the court feeling dissatisfied and deprived of an opportunity for the full presentation of their cases. And the judges, called away by these other duties, have been in the habit frequently of separating with their work unfinished; and we all know that it has been largely a practice for the judges of the general terms, after these brief and hurried hearings, after counsel have gone out of court dissatisfied because they have not been fully heard, to separate and, without much of any consultation, have one judge write an opinion and send it around to be concurred in, or not, as the case may be; and the tendency of all the *vis inertiæ* which exists among judges, as it does among others, has led toward concurrence rather than courting a troublesome struggle by disagreement with an opinion already written.

Then, again, the legislature has been constantly enlarging the scope of appeal from the general term to the Court of Appeals. It has opened doorway after doorway, through which constantly additional kinds of questions can be taken up to the Court of Appeals, so that the finality of the judgment of the general term has been constantly decreased, and, therefore, respect for their decisions has been decreased, and their own sense of responsibility has been decreased. Now, what we propose to do is this; we propose to divide the state into four departments, and in each department have a new appellate tribunal, which will take the place of the five

general terms of the Supreme Court, and the four general terms of the Superior City Courts, nine in all, to which all appeals, from whatever tribunal, shall go in the first instance; and we propose to make that a more effective and satisfactory tribunal than the existing general terms in these ways: In the first place, by giving a greater finality to its judgments than the general terms now have; finality in a much wider range of questions, by imposing limitations upon the jurisdiction of the Court of Appeals, and on the right of appeal to that court. In the next place, by giving stability, permanence and independence to that court, through making its members hold for a fixed term; and for that purpose we provide, that they shall be selected by the governor from all the justices elected to the Supreme Court, for terms of five years; the presiding judge for a term which shall be coextensive with the remainder of his term of office in the Supreme Court. We give them also the right, the power, to govern their own sessions and to appoint their own clerk, and fix the place where his office shall be held. So that instead of being a court without a clerk, without a home, without power of self-control, shifting, variable always, its members coming in and out from the trial courts, reviewing each other's decisions, without sufficient time for the performance of their duties, it will be a real court, with power, with permanence, with stability, and worthy of the name of an appellate tribunal. We propose, further, to give an opportunity for full discussion, by making it a court of five members; and five members will have to consult. One of the presiding justices of the general term said to me some time ago, " We cannot do any more work with five judges than we can with three." " Yes," I said, " but if you have five judges, will you not consult ? " " Yes," he said, " we will." And, therefore, I say, though five judges may not do any more work than three, they will do better work and better respected work.

In the next place, we propose to give them the opportunity for deliberation, consultation and full hearing, by relieving them of the obligation of doing all other judicial work. We make it so that they cannot be called upon to sit in circuit or in special terms, or to try or determine cases. This, then, will be a real court, constituted by the conjoint action of the elective principle, through the power exercised by the people in electing justices, and the appointive principle, through the power exercised by the governor, of selection from the justices of the Supreme Court, as respectable, as able, as efficient, as any court of last resort in any state of the Union. We believe that it will be more satisfactory and effective, that its judgments will be more respected, that they will be less frequently reversed, and, therefore, less frequently appealed from than the existing general terms. Correlative to the formation of this new court, which we call the Appellate Division of the Supreme Court, is the limitation upon appeals to the Court of Appeals. In framing this we have endeavored to follow a clear line of logical distinction between the Court of Appeals and the courts of first review, a line of distinction marked out by the proper function of a court of second appeal in settling and declaring the law; and we propose to limit the Court of Appeals in two ways; first, by limiting them to the review of questions of law, and, second, by limiting appeals to them to final judgments or orders. There is a general understanding now that the proper function of a Court of Appeals is to pass only on questions of law, but there is a great class of cases which finds its way into the Court of Appeals where virtually there is a review of the question of fact for a second time, and we close the door to that class, by declaring the principle that jurisdiction shall be limited to the review of questions of law, and by providing that no unanimous decision of an appellate division that there is evidence to sustain or support a verdict

not directed by the court, or a finding of fact, shall be reviewed by the Court of Appeals. So that when a man has tried his case and he has got a jury or a court to decide that a fact is proved, and five judges of the Appellate Division of the Supreme Court have unanimously held that the fact was proved, there is to be an end of controversy upon that fact. We believe that these two limitations, one limiting the court to the decision of questions of law, made effective by the supplementary provision that I have mentioned; the other limiting the review to final judgments, or orders, together with the increased respect and efficiency of the appellate division, will so greatly decrease the number of appeals to the Court of Appeals that it will for many years, will until the time comes for another constitution to be made, be able to deal with all the questions presented to it, and to keep up with its calendar. We have also, for greater certainty, and out of abundant caution, proposed the addition of two members to the bench of the Court of Appeals; and we think, or many of the committee think, that that will to some degree increase the working power of the court.

In reaching the conclusion that the course which I have outlined was the proper course to remedy the evils I have mentioned, the committee has had in contemplation several other alternatives, some of which have been proposed in amendments laid before it. And those were, first, that we might limit the jurisdiction of the Court of Appeals by fixing a moneyed amount, and preventing appeals to that court in any case which involves less than the amount fixed, following in that respect the Federal system which allows no appeal to the Supreme Court of the United States in cases involving less than five thousand dollars. But we do not believe that is a wise provision for the courts of this state. We think that as important questions of law arise in small cases as in great ones; and we believe, moreover, that the Court of Appeals

of this state, the court of last resort, which is to declare the law for the guidance of all the people, ought to be all the people's court. We believe that it should be the court of the poor man, so that he may feel that he may go there if he wants to, with his question of law, as well as the court of his wealthier fellow-citizen. We believe that it is only when based upon such a foundation, that any public institution can be permanent in a free constitutional government. Therefore, instead of putting in a moneyed limit upon appeals to the Court of Appeals, we have provided that the limit now existing should be taken off, and that no such limit shall ever be imposed. Another alternative was, that we might increase the Court of Appeals so largely that it could sit in two divisions. But we might as well abolish the court and rely solely upon these four separate appellate divisions as to divide the court and have it open to the same objections which have led us to put a court above them. Another alternative was that we might do as the judiciary commission of 1890 proposed, undertake to enumerate classes of cases upon which parties might go to the Court of Appeals, leaving other classes of cases upon which they should be stopped at the tribunal of first resort. But that is uncertain, indefinite, difficult of application. It is not within human power to avoid mistakes in enumeration and definition of such classes. It may be well to attempt it when, as in the Federal Circuit Court of Appeals act, there is a statute which may be revised every year by Congress; but to undertake to place in a constitution provisions of this kind, which are certain to require amendment, is an experiment that ought to be avoided if possible. There is a substantial objection to that also that it involves an element of unfairness to the citizens who are most interested in the class of cases that are not allowed to go to the Court of Appeals; and this other objection, that the same questions of law arise in different kinds of cases; the

same kinds of questions of various descriptions will arise in civil cases and in criminal cases, in common-law cases and in equity cases, in cases sounding in tort and cases sounding in contract; and if you undertake to limit the jurisdiction of the Court of Appeals by enumerating classes that can go and classes that cannot go there, you will have one court deciding as a last resort upon a given question arising in one kind of a case, and another deciding as a court of last resort, upon the same question arising in another kind of a case.

So, we come down to the plan we have adopted, which draws the line of limitation clearly on the logical division around those questions for which, and for which alone, the Court of Appeals was created, and leaves those questions to that court, and leaves all other questions to the new, strong, competent court which we propose to create for that purpose, and which we believe will give to every litigant all the protection to which he is entitled.

Mr. Chairman, there is another series of revisions in this report relating to Circuit Courts, Courts of Oyer and Terminer, and Courts of Sessions. We have provided for the abolition of the Courts of Oyer and Terminer, and of the Circuit Courts and conferred their jurisdiction upon the Supreme Court. We have done the same thing as to Courts of Sessions and confer their jurisdiction upon the County Court. We think, gentlemen, that this is not merely simplifying the statutes and doing away with something that is useless. We think that it is a distinct advantage in a popular government that the people shall understand the administration of the law, and that the fewer terms and forms you have in it, which are like the Egyptian mysteries, and which people do not know anything about, the better it is for the administration of the law; and these changes make in that direction.

We have done one other thing, to which I beg to call your attention; that is this: There has been in this state a constant process of enlargement of the jurisdiction of local and inferior tribunals. That is how we found ourselves confronting the situation with four Superior City Courts, which had been gradually built up, one of them during two hundred years, the others during much shorter periods, by the constant addition of jurisdiction, until each one had equal jurisdiction with the Supreme Court within the locality in which it was situated. That is not the way to enlarge the Supreme Court. We are proposing to take the judges of these courts into the Supreme Court, but it is not the scientific or the practical, or the proper way to enlarge the Supreme Court of the state. The true way is, if the Supreme Court is not large enough to perform its functions, and the people are satisfied of that, to make it large enough; not to build up another court which will be a rival to it, creating different jurisdictions, giving people an opportunity to select their jurisdiction, which, as somebody has said, if it is a good thing for the plaintiff, is always a wrong to the defendant. So we prohibit the legislature from ever enlarging the jurisdiction of local and inferior courts, so as to exceed for courts now existing, the jurisdiction they now have, and for any court hereafter created, the jurisdiction of the County Courts. We thus keep down to the level of local tribunals adapted to the performance of specific functions, all courts except the one Supreme Court; and we do that not only for symmetry, not only to avoid the inconveniences to which I have referred of the building up of these rivals to the Supreme Court, but we do it because it gives effect to a principle, and this is the principle. The proper trial of small causes is just as important as the proper trial of large causes. Small causes are just as important to those who have them as large causes

are to wealthier men. The great body of the people of the state have only small causes. When a court is organized for the trial of small causes it ought to attend to its business and try to do it just as well as any other court tries a million-dollar cause. But, if you enlarge the jurisdiction, and give it million-dollar causes to try, it will never attend to the little causes, and you spoil your court for the trial of small causes, and merely add another court to those which try large ones. We propose by this inhibition upon the legislature, to keep a system of courts in this state which will attend to the duty of properly trying the small causes, in which the great body of the people are more interested than they are in the large ones.

SECTARIAN EDUCATION

ADDRESS OF SEPTEMBER 1, 1894

The Convention in Committee of the Whole, Mr. Charles H. Truax in the chair, having under consideration a report relative to the use of public moneys for sectarian education, Mr. Root said:

I CAME to this convention, Mr. Chairman, in common with many of my fellow-delegates, expecting to vote to prohibit all state aid to any sectarian institution, whether educational or charitable. It is with regret that I have found an impression gaining ground in the convention that the attempt to prohibit such aid to sectarian charitable institutions might better be abandoned, and that a proposition made by the advocates of such aid might better be accepted, to the effect that there should be merely supervision of aid to charitable institutions, and not absolute prohibition. I now find, sir, that the very gentlemen who have been seeking to secure the acquiescence of this convention in leaving charitable institutions free from a prohibition, are insisting upon attaching to the proposition against state aid to sectarian institutions a proviso, which, in my judgment, if adopted, will send us out of this convention, not merely having failed to prohibit state aid to sectarian education, but having absolutely put into the constitution an authorization of such aid. There can be no mistake, Mr. Chairman, about the effect of the proviso offered by Mr. Lauterbach, from New York; no mistake as to effect of the proviso offered by Mr. Marshall, from Onondaga. They both mean, and both accomplish, so far as the subject I am now discussing is concerned, the same thing. After the clear and emphatic declaration contained in section four of the proposed article, that the money of the state shall not be used in aid or maintenance of any school or institution of learning wholly or in part under

the control or direction of any religious denomination, or in which any denominational tenet is taught, it is now proposed to say that this section shall not prohibit the appropriation of money for secular instruction, to the inmates of any orphan asylum or of any institution to which children may be committed by judicial process, if such education is incidental only; and that is, by the most friendly rules of construction, equivalent to putting into this proposition these words: " We hereby authorize the use of public money for the maintenance of charitable institutions under sectarian control and for instruction in schools connected therewith, under sectarian and denominational control." That, sir, is the act we are now invited to substitute for the contemplated prohibition of all state aid to sectarian charities.

I, for one, sir, will never vote for an article which contains such a constitutional authorization of state aid to sectarian institutions, or for any constitution which contains such an article; and I believe, sir, that the great body of the people of this state will refuse to give their sanction to any such provision. It is unnecessary, sir, to accomplish the purposes of the gentlemen who offer it; for there is not a man in this convention who has suggested or will suggest that the section, as it now stands, in the slightest degree interferes with the use of the state money for the maintenance of any orphan asylum, or any house of refuge, or any charitable institution; or in the slightest degree interferes with the use of the money of the state for the support or maintenance of any inmate of any charitable institution, even though that institution may be under sectarian control, and even though instruction may be given in it. The proviso proposed can do nothing to accomplish any benefit for the institutions in which these gentlemen are interested, but it throws open the doors for the accomplishment of what we all of us here have agreed to avoid, the giving of state aid to sectarian instruction.

The gentleman from Jefferson calls it a small thing. I beg leave to say, sir, that it is the greatest question and most important principle which has come before this convention, or will come before it until its final adjournment. Your fathers, Mr. Chairman, came to this country from that heroic little land in which Spanish soldiers under the iron hand of Philip the Second and the Duke of Alva strove to impress the power of the State of Spain upon the consciences of William the Silent and John of Barneveldt. Mine left their English homes in the reign of Charles the First, to escape that controlling force of Church and State united, which forbade them liberty of conscience. They came to a barbarous and inhospitable shore; they fought and conquered the savage; they felled the forests; they cleared the land; they established a state; they secured their independence of foreign control. They set up a reign of law and order, of peace and prosperity; and then they opened their hands of welcome to the fathers of the gentlemen who propose this amendment; they opened their hands to the fathers of the gentleman from New York, to the fathers of the gentleman from Onondaga, to the fathers of the gentlemen upon the other side of the chamber, who are so anxious to have this proviso inserted; and they welcomed them, not to savage and inhospitable shores, not to wars with savage foes, not to privation and hardship, but to a peaceful and a happy land, where home and comfort met them at the threshold, and they gave to them the freest exercise of conscience; they welcomed their religions with them, forgetful of all the tyranny they themselves had endured; they welcomed Hebrew and Catholic alike; they imposed no hostile, or professional, or business, or social bar against the full exercise of religion and the full privilege of citizenship, upon religious ground; but, Mr. Chairman, there is one thing, and one thing only, which this people, generous, broadminded,

and liberal, said, have always said, and say today, that never in this state of ours shall be repeated that union of Church and State, which drove your fathers and mine from their homes in the old world. And that, sir, is the principle which we seek to embody in this constitution of ours by the declaration reported by the Committee on Education. It is the greatest principle which this convention has opportunity to declare. And, Mr. Chairman, it should be, it must be, it shall be, cut down, modified, affected by no proviso, by no limitation, to secure or protect any private interest. Therefore, I believe that every true American, of whatever religion, will be for this section as it stands now. It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State.

THE POLITICAL USE OF MONEY

ADDRESS OF SEPTEMBER 3, 1894

It is recognized in democracies, where public officers are elected and questions of government are passed upon by the people, that political campaigns become in a large measure educational campaigns, and that for this purpose considerable sums of money can legitimately and wisely be expended. At the same time, there is a tendency on the part of unscrupulous politicians to make an improper use of money. The difficulty is to draw the line of demarkation between the legitimate and the corrupt use of money in political campaigns, and by apt laws to proscribe the illegitimate use of money and by criminal proceedings to punish both violators and violations of the law.

In the constitutional convention of 1894, the following amendments were proposed to article 2 of the constitution:

> Section 6. The legislature shall, by general laws, declare the uses which may be lawfully made of money or other valuable things by, or on behalf of, any person, to promote his nomination as a candidate for public office, and by or on behalf of a candidate to promote his election.
>
> The use or promise of money or other valuable thing to promote the nomination for, or election to, public office of any person otherwise than is expressly authorized by law, is prohibited and the person by whom or for whose benefit, with his consent, connivance or procurement the same is so used or promised, if elected, shall forfeit his office.
>
> Section 7. No corporation shall directly or indirectly use any of its money or property for, or in aid of, any political party or organization, or for, or in aid of, any candidate for political office or for nomination for such office, or in any manner use any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used.
>
> Every domestic corporation which violates this section shall forfeit its charter, and every foreign corporation which violates this section shall forfeit the right to do business in this state.

Both sections, as above, were adopted in the Committee of the Whole, but neither section was incorporated in the final draft of the constitution.

It is interesting to note that New York seems to have been the first state to enact laws against corrupt practices at elections. In 1890 the legislature passed a law requiring candidates to file an itemized statement of expenditures on penalty of imprisonment and loss of the office. In 1909, the legislature passed a law substantially in the words of the proposed amendment of 1894, prohibiting corporations, except political associations, from contributing to campaign funds or for any political purposes whatsoever.

While the two amendments above quoted were under consideration in the Committee of the Whole, on September 3, 1894, Mr. Root made the following addresses:

THE object of this provision, Mr. Chairman, is to lay down a general principle, to which the laws of the state shall conform, which is in accordance with what I believe to be the most enlightened sentiment of the time, and to fix the expressions of that sentiment in the constitution; to require the legislature in its laws to conform to it, and require the legislature to say what money may be used to procure the election of a candidate. Until that is done, there is absolutely no limit to corruption, no limit to the purchase of votes, no limit to the improper influence of voters, or of parties, or of party men. And you perceive that putting the two paragraphs in section 6 together, there is an entirely different state of affairs produced from that which now exists. By the first paragraph the legislature is required to declare affirmatively what uses of money may lawfully be made. That is a very different thing from prohibition. It is required to declare affirmatively, to enumerate the uses which may be made; and by the second paragraph all other uses than those expressly authorized are prohibited, and are made a ground for forfeiture of office. That is a very small step in the direction of the Corrupt Practices Act in force in England, which has worked such admirable results in respect of the election of the members of Parliament. Just so long as you undertake to enumerate your prohibitions upon the use of money, just so long evasions of those prohibitions will always be possible. But, if you enumerate the ways in which money may be used, affirmatively enumerate them, and then confine candidates for office, party committees, party agents, the agents of candidates, — confine them to those uses, and as a penalty for any knowing departure from those limitations, forfeiture of the office, you will have a very different state of affairs in respect to what we will all agree, I am sure, has become one of the great and crying evils of our politics; the enormous use of money in all our elections.

The use of money has come to such a pass at the hands of both of the great political parties in this country that we find enormous contributions necessary to maintain party machinery, to conduct party warfare; and the effect is that great moneyed interests, corporate and personal, are exerting yearly more and more undue influence in political affairs. Great moneyed interests are becoming more and more necessary to the support of political parties, and political parties are every year contracting greater debts to the men who can furnish the money to perform the necessary functions of party warfare. The object of this amendment is, by laying down a simple rule, to put an end, if possible, to that great crying evil of American politics. It may not accomplish everything, it may not be sufficient to end the evil wholly, but it is a step in the right direction, and is of a character which it is proper to incorporate in the constitution.

POLITICAL CONTRIBUTIONS BY CORPORATIONS

On the same date, Mr. Root spoke as follows on the proposed section 7, prohibiting political contributions by corporations:

THE idea of section 7, Mr. Chairman, is to prevent the great moneyed corporations of the country from furnishing the money with which to elect members of the legislature of this state, in order that those members of the legislature may vote to protect the corporations. It is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public.

It strikes, Mr. Chairman, at a constantly growing evil in our political affairs, which has, in my judgment, done more to shake the confidence of the plain people of small means in

our political institutions, than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of $50,000 or $100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it; a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress, or by the action of administrative or executive officers who have been elected in a measure through the use of the money so contributed.

It is precisely because laws aimed directly at the crime of bribery so far have been ineffective, that we deem it advisable to provide limitations short of the actual commission of the crime. I apprehend that many political committees and many candidates for office, if not most political committees and most candidates for office, will refuse to sanction a use of money which is prohibited in so solemn a manner, even though the prohibition be not affixed simply to a crime, and that that limitation being upon matters which are not done in the dark, but which are necessarily open and public to a great extent, would be much more easily enforced than the prohibition against the crime of bribery directly. I apprehend that many corporations, which are now called upon before every election to contribute large sums of money to campaign funds, would find in an absolute prohibition, with the penalty of the forfeiture of their charters, a reason why they would not make such contributions. I think it will be a protection to corporations and to candidates against demands upon them, and a protection to the people against the payment of consideration for contributions by them, to the injury of the representation of the people. It is, I repeat, because of the difficulty of proving and punishing the crime of buying votes, that some other measures seem to be desirable.

THE CIVIL SERVICE

ADDRESS OF SEPTEMBER 21, 1894

The following amendment to the constitution was adopted as section 9 of article V:

> Section 9. Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

While this amendment was under consideration in Committee of the Whole, Mr. Root spoke as follows:

I WISH to explain my vote. I am in favor of this amendment because I believe it puts into the constitution a principle, one of the most salutary of recent advancements in government. I believe in regard to that principle just what President Grant believed when, in his message to Congress in 1870, he recommended a provision for civil service reform, and said of civil service: "I would have it govern not the tenure but the manner of making all appointments." And said further: "The present system does not secure the best men and not even fit men for public office." I am not willing to stand, and I should regret to see my associates stand, upon any lower ground than that best and warmest of friends occupied twenty-four years ago. I believe, sir, that this principle ought to be incorporated in the constitution because it is right, and because I do not regard the words of party platforms as being mere buncombe, to be disregarded at will. Whatever may be the practice of the gentlemen who have been amusing themselves by sneers today upon the other side of the chamber as to regard for their party plat-

form, I believe, sir, in the civil service plank of the platforms to which I have given my adherence in years past, and shall vote accordingly today.

I think, sir, we should adopt this amendment for another and practical reason. As the matter stands today, the court of last resort has ruled that the principle of civil service cannot be applied to the important positions in the State Prisons and Public Works Department, and the effect of this amendment will be to extend this reform to state prisons and canals; and it will complete the adoption by this convention of the recommendations of the Prison Commission, which were that by constitutional amendment the system of contract labor should be abolished and the state prisons be taken out of politics. For these reasons, Mr. President, I am for the amendment as it stands, and I vote aye.

THE CONVENTION OF 1915

THE PRINCIPLES AND PRACTICE OF CONSTITUTIONAL REVISION

ADDRESS AS PRESIDING OFFICER AT THE DINNER MEETING OF THE ACADEMY OF POLITICAL SCIENCE, NEW YORK CITY NOVEMBER 19, 1914

THERE is an interesting parallel between the present constitutional convention and the one that preceded it. The last one ought to have occurred in 1887, twenty years after the convention of 1867. It did not please the party which happened to be in power in 1887 and for a number of years afterward to have the convention, because they could not get the arrangements just to suit them. At last, in 1892, everything was right and the convention was brought on; delegates were elected in 1893, and a convention was held in 1894. But, lo, after everything was right and the convention was determined upon, there came a revolution in the politics of the state, and the other party elected a majority of delegates and controlled the convention.

At this time it seemed to some one — I do not know to whom — that it would be a bright stroke of politics to advance the convention, and so a special election was held, and the convention was brought on by a narrow majority, composed in part, we already know through judicial decisions, of fraudulent votes. But lo, after the convention was thus determined upon, a revolution occurred and the other party controls the convention.

And the lesson is that it does not pay to be too acute and adroit and cunning in American politics. The best way is to go on in a simple, direct, honest, faithful effort to help the

working of our free self-government. Whoever does that will go ahead of the very smart politicians every time.

I wish to mention another parallel, or contrast, between the two conventions which I think is cause for great satisfaction. In September, 1894, the convention of that year had substantially completed its work, and had taken a recess for a few days to enable the committee on revision to give the last careful consideration to the terms or form of the work. I went up from Albany to Saratoga, where the Republican convention was held. I found myself put upon the committee on resolutions; I attended the meeting of the committee, and some one produced a platform which had been prepared and which was handed to the chairman of the committee. The platform was read, or run through hastily, and the chairman was about to put it to a vote. I noticed that no mention was made in this platform of the work of the constitutional convention — a convention the majority of which was composed of Republicans, nominated and elected by Republican votes. We thought that the convention had done some good things; but it was not considered of sufficient consequence to mention in the resolutions of the Republican convention which met immediately after the work was completed. I made some observations upon that subject, and was very loyally seconded by a gentleman for whom I have always had the kindliest feeling, the late Timothy L. Woodruff, and a clause was put into the platform approving the work of the convention. This year I went to Saratoga to attend the Republican convention, and there were present between twenty and thirty of the ablest leaders of opinion from all parts of the state of New York, who spent three days in discussing the question as to what position the Republican party ought to take in regard to the work of the constitutional convention. That marks a change in the public attitude towards questions of government.

And this meeting is something which twenty years ago never had a parallel. The members of that convention evolved out of their inner consciousness the provisions which seemed to them to be good for the state; and they had little help from anybody except the people who had a particular ax to grind. I don't care much whether people when they start are thinking right or wrong; I don't feel any apprehension about the people being too radical, or being too conservative. So long as the thoughtful people of the Republic will take a real interest in questions of government, will think about them and discuss them, so long we are sure to come out right.

Twenty years ago the thought and the feelings of the people of this state were asleep on fundamental questions of government. Today the thoughts and the feelings of the people of this state are awake, and interest is keen. Consequently I feel the greatest confidence in the product — not so much in the deliberations of the convention itself, as in the force of the intelligent, instructed, and mature public opinion of the state, operating upon the minds of the members of that convention.

Now let me say something practical about your work for the convention. The time is rapidly passing during which abstract discussion can be made useful. The convention will meet in the first week in April, and when that time comes it will be too late for the processes of general instruction. All the discussion that has been going on during these recent years, the discussion you are having now, must be brought into converging lines of practical suggestions — definite, certain, positive, practical suggestions, not discussions of theories of government, but helpful proposals as to what shall be written into the constitution.

The convention meets, I say, the first week in April. The time during which any suggestions can be made after the meeting begins will be very short, because we soon run into

the heat of summer. There are three stages of consideration of every proposal: first, consideration in committee; next, consideration by the convention, and at the same time, the general public verdict upon the reports of committees; and then, of course, consideration by the public after the convention has done its work. But the important, vital period of consideration is consideration in committee. That has got to be done in the early part of the convention, and the committee reports have got to be made early in order that there may be adequate discussion on the floor of the convention. Any one who has ideas as to what ought to go into this new constitution, or what amendments ought to be made to the old constitution, should get to work and prepare his ideas so that they can be presented to the convention promptly in April, so as to let the committees get to work at them. The convention will be obliged to fix an early date after which it will not receive and will not permit the introduction of new amendments. Otherwise the committees could never complete their work, and therefore the convention could never get at its work in considering committee reports. The time for you to bring to bear upon this important work the results of all your study and thought and discussion is very brief. You should lose no time in getting down to practical results.

Of course there are two quite distinct branches of work for the convention. One is the machinery of government. Our social and industrial conditions have changed vastly in twenty years. The business of government in this great state has outgrown the machinery of government. Much blame that is visited upon individuals is really due in a great measure to a defective system — a system adequate in simpler times, when the work to be done by government was quite within the experience of ordinary everyday life, and when any member of the legislature or of the executive branch could get on with it without much special study. The

increase in the multiplicity and complexity of things to be done calls for a shifting of the centers of activity. When a legislative body has more business to do than it can properly consider, there is only one avenue of relief, and that is a continual increase of delegation of power. What the legislature could readily have done fifty years ago, the legislature could not half do today, and it must delegate the other half to some one else. That delegation of authority to subordinate officers or bodies that must exercise discretion formerly withheld from them, that must make rules and regulations upon matters formerly dealt with by statute, requires careful adjustment of governmental machinery, and we have not the machinery properly adjusted for that necessary process of government. That is in general the occasion for the practical overhauling of the machinery of our state government. And as to that, everybody who has practical knowledge about the affairs of government ought to put his mind to work to see what useful suggestions he can make; for there will be a thousand men outside of the convention with practical experience about the operations of government and useful ideas regarding it, to one in the convention.

The other field is the field of the principles of government, a field in which our American constitutions occupy a place of their own in all the world, a place of their own in all the history of government. So far as the principles of government declared in our constitutions are right they do not change. No development of social or industrial life changes a true principle. And there are certain dangers to be considered when we turn our attention to that field of the convention's work — the reconsideration of the fundamental principles of government which are to direct, limit, control the operations of the government of the state.

In the first place, there is always the danger coming from the people who grow faint-hearted, because the path of liberty and justice is narrow and a hard one to tread. You see

sometimes a young man who begins life with brilliant talents, undertakes this profession, and presently, finding it difficult, turns to another, and after a while leaves that and turns to another, and then to still another. His life is wasted. There is a little tendency of that kind in government. No great principle can be applied year after year, and generation after generation, where the people develop incompetency, and cease to grow in intelligent capacity. No principle can be applied without meeting obstacles, and being surrounded by inconveniences, and having the faint-hearted say, "Let us find some other way to work out our salvation. Oh, to abandon the hard and painful and trying effort!"

To grow in power, to grow in capacity for true liberty and true justice by holding fast to true principles, is hard. There are many who grow tired, who would find some easier way; but the easier way will but lead from the true path into some other easy way, and that into some other. Self-government, which is the basis and essence of our free republican government, is hard and discouraging. It requires courage and persistency and true patriotism to keep the grip on the handle of the plow and drive the furrow through. But wherever there is a true principle embodied in our constitution, we must stand by it and maintain it against all patent nostrums.

On the other hand, there are indications extensive and numerous of a reaction from certain extreme views, from certain enthusiasm for new devices in government. But we must remember that if reaction goes too far the pendulum will swing back the other way. All our statements of principle must be re-examined, not with faint hearts, but with a sincere purpose to ascertain whether the statement is sound and right, and whether it needs modification with reference to the new conditions in order more perfectly to express the principle.

I feel very differently about this convention from the way in which I felt twenty years ago, because it seems to me that upon this field of action dealing with the fundamental principles of our government we are performing the highest and most sacred duty that civilization ever demands from man. All the little questions of form and method may be right or wrong; we may solve them rightly or wrongly. If they are wrong they will be changed. If the law is wrong it will be changed. If it is not perfect it will be amended. But when a people undertakes to state fundamental principles of its government, it is putting to the test its right and its power to live. Millions of men in western Europe today who are battling with each other, dying by the thousands, are fighting upon one side or the other of two different conceptions of national morality. Homes are desolated, children left fatherless, because two great principles of national morality have met in their death-grip. The nation which lays hold of the truth, of the true principles of liberty and justice will live. The nation that is wrong, the nation that fails to grasp the truth, will die. In our effort or attempt to make and remake the constitutions of our beloved country we are putting to the test the very life of the country. To that task we should address ourselves with the prayer that we may be free from selfishness. That task should be performed with a sense of duty to one's country that rises to the level of religion. With the help of all the good men and women of our state we should be able to keep this convention right, upon the eternal principles by which alone our free and peaceful and just country can continue.

THE BUSINESS MEN AND THE CONSTITUTIONAL CONVENTION

ADDRESS BEFORE THE MERCHANTS' ASSOCIATION OF NEW YORK MARCH 25, 1915

In the address preceding, Mr. Root spoke in advance of the constitutional convention upon the principles and practice of constitutional revision. In the present address, also delivered before the opening of the convention, he spoke of the business men of the state and the constitutional convention. As Mr. Root refers on two occasions in this address to Mr. Choate, it is proper to quote a few paragraphs of Mr. Choate's remarks in introducing Mr. Root, in order that the reader may understand the relations existing between these two men. Mr. Choate said:

> It is fifty years about since I first made the acquaintance of Mr. Root, a stripling as he appeared to me then, just come down from Hamilton College and admitted to the bar. I was some twelve or fourteen years ahead of him. I had not the least idea that he would ever catch up at all. But he did catch up in a very few years, and it was not long before Bangs and Parsons and Carter and I, who were doing a good deal of the heavy work at that time, found him going neck and neck with us, and it did not take very long for us to find that he was forging ahead of us all, . . .
>
> I will tell you the secret of Mr. Root's success. In the first place, of course, it is " the sound mind in the sound body," a great brain, a well-knit frame, and exceedingly good habits; but then, besides that, he was an infinite worker; I think he worked flying; wherever he moved, he was working, and that accounted for his success at the bar.
>
> But I will tell you what I regard as the great feature of his personal and professional career, and that is that from the first he was ready to forego the profits of his practice to render public service, . . .

I NEVER listen to Mr. Choate without recalling the sense of incompetency and despair with which I used to sit and see him carry juries away and steal verdicts from my unfortunate clients. But it is impossible not to forgive him. He contributes so much to my happiness and the happiness of all of his countrymen that I can forgive him even for the fatal injury he does me in setting up a standard that I cannot possibly live up to.

I thank you, gentlemen, for this greeting and for the great compliment of your gathering here at a luncheon which is avowedly for the purpose of making me the guest of the Association. There is but one disadvantage in the vastness of this assemblage, and that is that it is necessary in talking with you to talk very loud, and it is quite impossible for any one, in loud tones of voice, to be quite as sensible as he can sometimes be in ordinary conversation. There is always a temptation to attempt oratory, and as a rule oratory and sense are to be found in inverse proportions.

There is a substantial satisfaction to me, not all personal, in this great gathering; it is a satisfaction due to perceiving that the business men of New York are at last taking an interest in their own public affairs; that you are at last taking an interest in the over-head charges of all your business, which are created by the conduct of government; that you are at last taking an interest, before it is too late, in the law and the administration which create opportunity or hamper enterprise. Do not think that I am dropping into oratory when I say that. There are great parts of the people of the United States who feel that the man who makes any money by successful business is a robber, and it is time that that feeling was dispelled and that that view should become a vagary of the past.

Now, Americans must always keep their faces toward the future, and the thing that is admittedly before us in a public way in this state is the revision of the state constitution. There are a few things I want to say to you about that.

In the first place, I bespeak your interest for the work of the constitutional convention. It needs speaking for. The votes in this state upon questions of constitutional amendment have ordinarily been most pitiful in number; only from a quarter to a half of the people voting at our elections

have taken interest enough to cast votes for or against amendments of the constitution. It seems sometimes as if our people were interested in nothing but personalities, and that we wanted a government of men and not a government of laws. It seems sometimes as if our people do not realize that it makes any difference to them what laws they have or how they are administered. I am glad to see that there is a change in that opinion. I beg you to follow with interest the work of this convention and to take sufficient interest in it to consider and discuss and vote upon the results.

Let me tell you that it is none too soon for you to be interested. The business man of America has been at a heavy discount of recent years. All other elements of our population have organized and been active in their own behalf. The agriculturalists have organized and their representatives have been heard from. The labor men have been organized and their representatives can be seen day by day in the galleries of the two Houses of Congress, watching the men who are making the laws to see whether they shall win the great prize of the labor vote or lose it by independence.

The business man alone has seemed to be paralyzed of recent years, and the delightful thing about this meeting is that this is something besides paper organization. There are plenty of concerns on paper — there are plenty of men going about and talking about the great interests they represent — and they don't represent anybody but themselves. But here is evidence that the men who are represented are really behind their representatives — that there is something besides paper organization, something besides oratory stirring in the interests of the great industry and commerce and production of the United States. And if you will follow the line that you have entered upon it will soon come to be no longer true that the pursuit of profitable business is to be regarded as robbery. For after all it is you, it is the voters of New York,

who must pass upon a revision of the constitution. When the work is done and submitted you must vote for it or against it; you must act upon it ignorantly or advisedly, and if you do not take interest enough to be informed and to inform your neighbors about the merits of it, it will go by default.

A second thing I want to say is: Do not expect the convention to do too much. It ought not to do too much; it had better do too little than too much. It is not the office of the convention to turn everything upside down and to sweep all our system away and inaugurate a new one. Our laws, fundamental and ordinary, are to be based upon our history. It is not the function of legislators in Congress or legislature, or constitutional convention to put into a law what happens to occur to them as being a pretty good thing. It is their function faithfully to register the customs and mature conclusions of the people whom they serve, so that each successive step in legislative development may be but a record of the growth and development of our life.

We are attracted from day to day by new schemes of reform, many of them most praiseworthy, many of them most necessary. Today we are interested in this one, and tomorrow in another and the next day in a third. But after all, the all-important thing is the preservation of the great body of the rights and liberties of our self-governing people which have been growing year by year, century by century, since Magna Charta, and under which we live now in peace and order and opportunity for posterity and for growth in spirit and in power.

It will be the first and greatest duty of the convention which is about to meet to preserve all that is good, all that has been approved of, all that has been tried in our system of free self-government. I would rather see a legislature praised for doing little and doing it well than see it praised for

doing much. A very wise old friend of mine said, many years ago, "It does not make so much difference how much a man does as what he does."

We are seeing now in the newspapers remarks that this legislature has not done much. I had a count made not long ago in the Library of Congress of the number of laws that had been passed in the five preceding years. That was made last year, and in the five years ended the first of December, 1913, I found that over sixty-two thousand laws had been passed by Congress and the state legislatures in this country in that five years; and I found that there had been reported during that five years and published in six hundred and thirty volumes of reports of the courts over sixty-five thousand decisions of courts of last resort in this country. Now even Mr. Choate does not know them all by heart. How can you possibly know them? How can you conduct your business and keep out of jail? So, give credit to the convention for what it does not do.

A third thing is: Do not be out of patience with us if we discuss at wearisome length the proposals that are brought before the convention. Remember that long discussion, free, open, unrestrained and unchecked discussion in representative assemblies under our form of representative government, is the substitute for war. In Mexico today you see the other method of conducting government. You must have, among a virile people, differences of opinion, with men adhering to their opinion with determination; and there are only two ways to reach the conclusions that are necessary for peace and honor. One is the way of discussing them, arguing them out, getting to conclusions by long and painful discussion, and the other is by shooting the man that is opposed to you. Our system is the first, so when we talk for long days in the heat of summer over the questions we have before us, remember that we are a great Peace Society.

But there is one thing which the convention, I feel, ought to do. The business of government in this state, and in most of our states, has outgrown the machinery; or many of our states, I will say, have outgrown the machinery of government. Our machinery, executive and legislative and judicial, was established in simpler times; it was established when government interfered much less in the affairs of the people than it is compelled to do now. The change from individualism, from individual activity to combined activity, has made it necessary for government to do many things which were formerly left to the individual.

We are all dependent upon each other; we are all interdependent. The great combinations of capital and of labor; the dependence of each man, in his ordinary life, upon the activities — the continued activities — of a multitude of other men, for his breakfast, his light, his heat, his access to the street, the preservation of his health or that of his family, for education, for transportation, all make it necessary that there should be government regulation of the activities of life. Now in these later days of complicated government activity affecting the vast multitude of interests, of occupations and of social relations in our state, the time clearly has come when the machinery of government shall be reformed so that it shall be competent to attend to the business. We are running a railroad with a stage-coach organization.

We should learn a lesson from those great business organizations which have reduced the price of production and enlarged the boundaries of commerce, and have made the production of wealth in these recent years the subject of the astonishment of mankind. We should learn a lesson from business, from business men, from the great business geniuses of our country, and apply that lesson to the affairs of our government.

The first thing — the one all-important thing — is to make the organization so that responsibility shall be fixed. You and I don't know who is really responsible in our state government for what goes wrong or for what goes right. We don't know who really are to be blamed, and we don't know who really ought to be praised; and there is no way of having effective service in government any more than in a business enterprise unless you can put your finger on the man who is responsible for this error, or should be commended for that success.

And in order that there shall be responsibility, power must go with the responsibility. You cannot hold men responsible unless you give them power. The Governor of the state to-day is being unjustly criticised for not doing things that our system withholds the power to do from him, and that will be so until we have improved the system on business principles.

When that has been done, we can hold somebody accountable. But, gentlemen, the doing of it is going to meet with obstacles. The doing of it is going to turn some people out of office — is going to withdraw from some people the opportunities for office which they have been looking forward to. Individual interests and local interests and special corporate interests are going to feel themselves interfered with. It often happens, when public interest has not been aroused, that it seems in the course of government as if the only consideration that had no friends was the consideration that rested only upon the public good. It is for you, with your practical business sense, to put yourselves behind whatever the convention may find it practicable to do for the promotion of the public interests, and to give it the force and momentum of your support as against all private and local individual interests and prejudices; and I can assure you that this gathering of the business men of New York will

give greater life and hope and courage to the members of the coming constitutional convention who are sitting about me at this table. One thing we shall miss, and that is the noble and courageous and brilliant leadership of the man who presided over the deliberations of the last convention.

We shall miss him sadly, but, Heaven be praised, his spirit and the benign influence of his character and the inspiration of his genius will still be with us, and we shall do all that we can fairly be called upon to do — our best — for the interests of our beloved state and our beloved country.

OPENING ADDRESS

AS PRESIDENT OF THE CONSTITUTIONAL CONVENTION STATE OF NEW YORK, APRIL 6, 1915

The delegates to the constitutional convention of 1915 were elected, sixteen at large and three from each of the fifty-one senatorial districts of the state, making a total membership of 169.

The convention met in the assembly chamber in the Capitol at Albany on April 6, 1915, and proceeded to elect Mr. Root its president by a vote of 129 to 32 for Mr. Morgan J. O'Brien. The election was immediately made unanimous and thereupon Mr. Root delivered the following address:

I THANK you for the great honor that you have conferred in making me your president. I prize very highly the confidence which it implies. The presiding officer of the convention can accomplish nothing of value without your unselfish support, but I feel sure of having that, and with it I shall try to administer fairly the rules of parliamentary law which are based upon the experience derived through centuries of growth in representative government. Observance of such rules is indispensable to the free, open, public discussion in representative assemblies essential to the conduct of popular government. Upon the real freedom and sincerity of our discussions and the evidences of matured judgment which we present in assigning the reasons for our conclusions will depend to a great degree the approval or rejection of our labors; for the people themselves will pass upon our work in the light of the reasons we present and our revision will receive its effect by their vote and not by ours.

The most obvious duty before us is to scrutinize attentively the framework of the state government in order to ascertain in what respect, if any, the established institutions are insufficient or ill-adapted to accomplish the ends of government. Great changes have come in the industrial and social life of

the state since the last convention. To attain the ends which every one agrees ought to be attained it appears necessary that government shall interfere to a much greater extent than in former times with the complicated and interdependent life of the people. The business which government is required to undertake has vastly increased both in magnitude and variety and there is a widespread feeling that in some respects the business of the government has outgrown the organization of government. Many thoughtful citizens consider that our system of taxation, appropriation, and expenditure of moneys, which worked very well in simpler times, is now quite inadequate. Many think that the strictly municipal interests of our great cities require more protection in the way of home rule provisions than is afforded in the present constitution. Many think that the natural resources of the state, particularly the forests and water power, should be brought under a system of conservation and utilization having the stability of a constitutional basis.

Many think that our ballot has become too complicated and unwieldy and that the real power of the voter over the affairs of government would be increased if there were fewer candidates to be voted for, and fewer subjects for the voter to pass upon, at the same time. Many think that the great multitude of separate offices and commissions which have been created from time to time to meet new demands for official action should be brought into more definite relations with each other and under more systematic supervision and control.

These and other subjects have enlisted the interest of respectable bodies of citizens who are entitled to have from this convention attentive consideration of their opinions. I will not continue the enumeration or enter upon a discussion of the subjects to be presented further than to say that we have before us in our own country signal examples of great

business organizations for production and commerce, through which conservation of resources, economy of expenditure, and effectiveness of action have been attained to a very high degree, and citizens concerned in the great business of government may well learn a lesson from these examples.

The fundamental principle to be applied I take to be that responsibility and power shall always go together. Responsibility without power can never be justly enforced, and power without responsibility can never be duly controlled. Vague, indefinite, uncertain, overlapping, and conflicting grants of power and divided responsibility make good administration impossible. Every public officer and agent should have clear and definite authority to do the acts required of him and should have some one over him with authority to hold him to responsibility, from the lowest employee to the highest elected officer whom the people themselves hold to responsibility at the polls. Grants of power should be clear and definite, and the responsibility should be open, public, ascertained, and unmistakable, so that praise and blame, reward and punishment, may be assigned by the people themselves with justice and certainty.

In all our labors let us keep in mind that it is our duty, so far as our powers go, to preserve as well as to improve. While we seek to adapt the machinery of government to changing conditions, we are still to preserve the great body of rights and liberties which have grown through many centuries of political and juridical development, and under which we have so long been blessed by peace, order, justice, and individual liberty and opportunity. It is not for us to tear down institutions based upon the customs and growing out of the life of the people whom we serve, merely for the purpose of substituting in their place creations of our own devising, however confident we may feel in the success of the experiments we may contemplate.

No wise legislator will under-value the power for peace and order and progress which lies in the traditions of respect, the conformity to custom, and the habit of obedience among a people towards their own established, though perhaps illogical, institutions. Where changes are needed they should be made fearlessly and thoroughly but in such a manner, with such relation to existing custom and opinion as to be natural developments from the life of the people of the state; and in a state with such a history as ours the burden of proof rests always upon the advocates of change.

There is one other duty which a constitutional convention must always contemplate, although the constancy of our people to the political ideals they have long followed may make it unnecessary for us now to give much of our time to its consideration. It is the proper office of a constitution not merely to provide the framework of government, but to declare the principles of political morality and the rules of right conduct which are to control the state in its relations to the individual citizen. In that field the action of a constitutional convention is quite unlike ordinary legislation.

In prescribing constitutional limitations and framing bills of right, a convention acts impersonally, in the abstract, without regard to particular occasion or special instance, and free from the excitements, the passions, the interested motives, the personal attractions and repulsions, which so often affect the ordinary affairs of government. Yet the conclusions to be recorded are of vast practical importance, for they determine not alone the precise and formal limitations upon official power, but the spirit in which government will be conducted and the tendencies of the nation's life.

Under the American conception of government the power of the state and of the nation and of all their agents equally with the powers of the individual man, are subordinate to rules of right. Under the view with which this government

was founded and exists there is a duty of public morality as truly as there is a duty of private morality. There can be no sovereignty superior to the law of morals. Above public power stands always the conception of public right. The answer to the question, " What is the rule of public morality; what is the test of public right ? " is not easy. It is to be found, I believe, not in the reasoning of acute and highly trained specialists, but in the conscience of the great body of the people when the people are instructed, law-abiding, and liberty-loving, and when their voice is free from the impulses and distractions of special occasions, interests and desires.

Under our system, from generation to generation, the constitutional convention is the interpreter of the conscience of the people of its time in its answer to this vital and all-important question, " What is the moral law that rules our state and through what limitations shall our exercise of public power be made to conform to that law ? " In entering upon the performance of that solemn and lofty duty, let us seek for a new birth in our souls of unselfish patriotism and strive for the power of clear vision and right thinking. We have in America one unchanging guide in the political philosophy of that great instrument which gave birth to the nation.

" All men," says the Declaration of Independence, " are endowed by their Creator with certain unalienable rights. To secure these rights governments are instituted among men." That is a distinct denial and reversal of the theory which was held by the ancient republics and is still widely held and advocated, and which begins with the state as the basis of civil society, and derives the rights of the individual only as a member of the state.

With us the rights of the individual citizen are not derived from the state, but are independent of it; and all the powers of government find their justification only in their adaptation to secure the rights of the individual. The freedom of

the individual will is limited only by the equal rights of all other individuals. The rights of the individual citizen to life, to liberty, to the pursuit of happiness, are held by indefeasible title. He cannot rightfully be deprived of those rights by legislatures or executives or majorities or armies. To secure the equal rights of every one of the ten million people of the state of New York is the end and object of all that we are to do; and an affirmation of the sacredness of those equal and inalienable individual rights, is the primary maxim of the political morality which is to direct our conduct.

This is the seventh of the conventions meeting in orderly succession during the one hundred and thirty-nine years which have elapsed since New York was a colony. One who reviews the labors of the men that strove with the problems of their day in 1777, in 1801, in 1821, in 1846, in 1867, and in 1894 cannot fail to be impressed by the evidence that the problems of government never end. Settled for the moment they continually reappear in slightly varying forms upon the requirement of new conditions. Yet the unending effort for solution is the process which gives direction to the development of national life.

Above all our predecessors we are fortunate in serving a community itself inspired by an unprecedented interest in the subjects with which we are to deal, appreciating their importance, eager in discussion, fruitful of suggestion, desirous to contribute to a wise conclusion. That condition is a cheerful harbinger of the future, for indifference is the deadliest foe of democracy. A people alive to its problems is certain to move forward. If by thorough study and practical sense and sincerity of purpose we can lead this great discussion among the self-governing people of the state, even though not a line we write were voted into the constitution, this convention will not have failed in its purpose of usefulness to its generation.

MAGNA CHARTA

ADDRESS BEFORE THE CONSTITUTIONAL CONVENTION IN COMMEMORATION OF THE SEVEN HUNDREDTH ANNIVERSARY OF MAGNA CHARTA, JUNE 15, 1915

THE convention appointed by the people of the state to revise the fundamental law under which we live, as to the framework of government and the principles of public morality, has deemed it appropriate to arrange for a celebration of the seven hundredth anniversary of the signing of Magna Charta.

That was a great event in English history. The restrained and unemotional English themselves, in their most formal public documents, describe it as the Great Charter of English liberty. But it is not merely as a great event in English history that we celebrate it. It was a great event in our history, and it was a great event in the world's history.

That instrument which the barons compelled King John to sign contained no rhetoric; it did not philosophize; it was a plain, practical assertion of common rights fitted to the use of the people of England of that day. Hundreds of great declarations of principles have been made and forgotten since that time, but this simple, homely growth from the life of the English people has endured these seven hundred years.

The Charter was not a gift of privilege by the monarch. Hundreds of monarchs have granted privileges to their subjects since that time and the privileges have been forgotten, and the monarchs with them. It was an assertion of right by men who were willing to fight for their rights, and to die for them. And during all these seven hundred years, the men to whom that has been the Great Charter of liberties have been willing to fight for their liberties and to die for them.

But even those qualities were not the essential thing which kept alive this wonderful instrument, for seven hundred years. The essential thing was that the Great Charter asserted a principle of human liberty upon which rests the development of the freedom of the world. It asserted — it did not ask for — it asserted the rights of Englishmen as against their government, and superior to their government. Without rhetoric, without reasoning, without philosophy, it asserted those rights which, nearly six hundred years later, the sons of those Englishmen crystallized in the Declaration of American Independence, as the inalienable rights of man, to secure which governments are created.

There are but two underlying theories of man in the social relation to the state: One is the theory of the ancient republics, under which the state is the starting point from which rights are deduced, and the individual holds rights only as a member of the state. That was the theory of Greece, and Rome, and the Italian republics. The other is the theory of the Great Charter, the theory of the Habeas Corpus Act, of the Statute of Treasons, of the Petition of Rights, of the Bill of Rights, of the Massachusetts Body of Liberties, of the Declaration of Independence, of the American Republic, that the individual has inalienable rights, of which no government may deprive him, but to secure which all government exists.

The first theory, of the ancient republic, that the state is all in all and the individual derives his rights as a member, leads to the logical and inevitable result that the state is free from those rules of morality by which individual men are bound. It is the principle which was applied in Belgium. It is the principle which was applied to the *Lusitania.*

The other, asserted in the Great Charter, by logical and inevitable result binds the state by the rules of morality which the individual recognizes; and this supremacy of that

rule of right, governing all men and all states and powers, is the hope of mankind.

The assertion of that great and eternal principle seven hundred years ago we celebrate as the greatest of all events in the political development of modern liberty.

IMPEACHMENT

ADDRESS BEFORE THE CONSTITUTIONAL CONVENTION AUGUST 20, 1915

The constitutional convention of 1915 proposed to amend article VIII, section 15, of the constitution of 1894, so that it would read as follows, the amendment being indicated in italics:

> Section 15. The assembly shall have the power of impeachment, by a vote of a majority of all the members elected. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. *On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the president of the senate shall act as a member of the court. The court for the trial of impeachments may order all or any part of the testimony to be taken and reported by a committee composed of members of the court, except that the impeached officer must be allowed to testify before the court if he so desire.* No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this state; but the party impeached shall be liable to indictment and punishment according to law.

When this article, as amended, was before the Committee of the Whole, Mr. Root made the following remarks:

AN impeachment is not a criminal proceeding. The express provision of our constitution, the common provision of constitutions, is that judgment shall not extend beyond removal from office to which disqualification from future holding of office may be added and the party impeached may still be indictable and punished, according to law.

These very precise and rigid rules of protection of defendants in criminal cases, are out of tenderness of the law for liberty and life, which are not called in question at all in impeachment cases. An impeachment is purely a matter

between the people and their political agent, and the great obstacle to the successful use of impeachment as a means of enabling the people to deal with their unfaithful servants arises from the fact that an impeachment stops the wheels of government. The injury to the conduct of the affairs of government is so great that it does not pay to impeach unless there is a very, very serious case and a scandal which leads the public to demand that there shall be action. And there ought to have been more than four impeachments in this state, and a great many more. We would have had a better government and a more contented people if this remedy had been more practical and available so that more unfaithful officers should have been called to account.

The inadequacy of the remedy has been such that over a large part of our country people have been demanding — what? Not that public officials should have their office secured by the right of trial before a court and impartial tribunal, with the right to be confronted with the witnesses, with the right to specific charges, with the right to require that the charges be affirmatively proven, with the right of judicial judgment upon the proof, but that they should be liable to be recalled by a popular vote cast upon the information obtained from the columns of the newspapers. I say it is the inadequacy of the remedy of impeachment which has led to the wide-spread demand for recall and those of us who believe that that would be a great misfortune are bound to make the legal remedy, in which is opportunity for the public official to require proof, be confronted with the witnesses and to have opportunity to cross-examine and give his evidence and have judicial judgment — make that so adequate that we will hear no more of this demand for recall.

I have sat for weeks in the trial of an impeachment case, feeling that the injury to the interests of the people of the country through the stoppage of the wheels of government in

order to listen to a large mass of testimony that I knew would not be disputed, made it hardly worth while to get rid of the unfaithful official.

This provision is one which will permit every really important witness to be heard before the court. Of course, if a showing is made, if a suggestion is made, that a particular witness is a critical one, that counsel want court to see him and hear him when he testifies, then order the testimony to be taken before him. But the great body of testimony is not of that character. Of course, counsel for the defense requires the other side to prove their entire case, whether they have any idea of controversy over the proof or not, and it is that great mass of routine, customary, but obligatory testimony which ought to be taken by a commission composed of members of the court and reporting, so that the great mass, the great body of the chief legislative assembly of the state and of the judges of the Court of Appeals shall not be obliged to waste their time while it is being taken.

It seems to me that this is a practical, sensible piece of government business, for us to make this method of dealing with unfaithful officials more available and useful. I hope the amendment will prevail.

ON ENDING THE SCANDAL OF THE LAW'S DELAYS

ADDRESS OF AUGUST 19, 1915

Article VIII of the proposed constitution dealt with the judiciary, and section 6 thereof was entitled the Civil Practice Act. This section made it the duty of the legislature to act with all convenient speed upon the report of the Board of Statutory Consolidation transmitted to the legislature on April 21, 1915, and to enact a brief and simple civil practice act and to adopt a separate body of civil practice rules for the regulation of procedure in the Court of Appeals, the Supreme Court and county courts. Secondly, at intervals of not less than five years the legislature was authorized to appoint a commission to consider and report what changes, if any, there should be in the law and rules governing civil procedure. Further, the legislature was forbidden to " enact any law prescribing, regulating, or changing the civil procedure in the Court of Appeals, Supreme Court, or county courts, unless the Judges or Justices empowered to make and amend civil practice rules shall certify that legislation is necessary." It was finally declared that after the adoption of the civil practice rules by the legislature the power to alter and amend such rules and to make, alter and amend civil practice rules should vest and remain in the courts of the state, to be exercised by the judges of the Court of Appeals and the justices of the Appellate Division of the Supreme Court or by such judges or justices of the Court of Appeals, the Supreme Court and the county courts as the legislature might provide.

When this section of the constitution was under consideration in the Committee of the Whole, Mr. Root delivered the following address:

I WANT to say a few words which are stirred up by the appeal to memory by the gentleman from Saratoga.

I remember the conditions which existed prior to the adoption of the Civil Procedure Act of 1875, going back a good many years before. I was in the thick of the controversy long before Montgomery Throop changed it in his great tome which was called *The Code of Civil Procedure*, and the controversy was between the old common-law practice and the advocates of the reform procedure which went all over the country. That reform was accomplished under the express direction of the constitution of 1846. . . .

Under the old common-law system practice had become so complicated and difficult that it was hard for an honest man to get his rights. There is a good deal of human nature in that. It has been so since the laws of the Medes and Persians were formulated; it has been so since the day of Egypt's power. Wherever a special class of men have been entrusted with the formulation and administration of law, they tend to make it a mystery; they tend to become more and more subtle and refined in their discriminations, until ultimately they have got out of the field where they can be followed up by plain, honest people's minds, and some power must be exerted to bring them back. The constitution of 1846 exerted that power to bring the practice of the law out of the discredit into which it had fallen because of the intricacy and the complication and the technicality and the subtlety of the old common-law practice. Mr. Field brought it back with the code, of three hundred and odd sections, which bears his name, and the reform in procedure went all over the country. Curiously enough, just about the time that England followed the example and adopted the reformed procedure in her Judicature Act of 1873, we began to take a back track and Mr. Throop's attempt to condense in a volume which was called *The Code of Civil Procedure* a great number of particular and minute provisions regarding practice was the first great step in that direction, in the backward direction.

Now, in the forty years which have elapsed, we have been following in that same pathway until the people of our state have come to regard the simplification of practice as one of the great issues of the day. I believe there is no duty which is demanded from this convention more generally than the duty to do something to make our practice more simple, speedy, inexpensive, and effective. Why is it? A careful study of it reveals the cause, or the principal cause. I have

listened to discussions and have taken part in them in the Bar Association of my own city, in the State Bar Association, in the American Bar Association, in countless conversations with lawyers and with laymen, and I say the cause of the prevailing discontent with our practice is to be found in the fact that year by year during all this period of forty years, there has been a continual addition, step by step, statute by statute, to the multitude of definite, certain, precise rules of procedure, binding upon the men that seek redress of wrongs in the courts. One of our most honored and beloved judges in the Court of Appeals said to me the other day, when I asked him how he thought this plan would work, " I have had since I came here to buy fifteen editions of the *Code* because it is so continually changed that after every session of the legislature my last edition is useless," and he gave this plan his warm approval.

The trouble is not in a particular provision. These provisions that are put in are put in with good intent. The men who propose them in the legislature are honest men who believe that they are useful, but they are not the result of any general view of the subject. They are the result of particular views of the needs of particular cases; and a provision that a member of the assembly or the senate may well honestly believe to be useful upon his experience in a particular case, may work very badly, interfering with the obtaining of justice in many other different cases. And when you come to put them all together, you have a great variety of statutory rights. Each one of these is a statutory right. I heard the other day a lawyer in New York boast that he could postpone any litigation for seven years, and I asked a lot of friends as I came along whether that was true, and they all said they did not doubt it. How ? Why, by compelling the honest fellow that comes into court to redress a wrong or to secure a right, to litigate one after the other these statutory rights that have

been created by the legislature. Courts cannot ignore them because they are rights given by law. The courts must observe the law, and so the plain man who wants to get a wrong redressed has, bristling between his demand for redress and his judgment a dozen litigations that he has to fight out before he can get to the end of his cause.

My friends of the bar, we have been making our system of procedure here conform to the subtle, acute, highly-trained ideas of lawyers. That is not the true basis. The system of procedure, of course, cannot be simple, but as far as possible, it ought to be made to conform to the plain man's intelligence and experience. It ought to be so that the farmer and the merchant and the laborer can understand it, and know why he is delayed in getting his rights; can understand that the processes to which he is subject have a reason and know what the reason is, otherwise you cannot have that respect for the law, that confidence in its justice necessary for the maintenance of a system of just administration. And furthermore the existence of this great variety of minute, detailed statutory provisions has been breeding up a great number of code lawyers, and by that I mean lawyers whose principal concern is with the statutory code of rights and not with getting justice for their clients.

Now, we ought to get back, get back to the fundamental idea of our profession which is the administration of justice. These minute, particular code provisions substitute rules, multitudes of rules for the justice of the particular case. I agree with Mr. Brackett. I am old enough at the bar to have the men who were my partners, my juniors, my clerks, sitting on the bench, and I look at them from a different angle from that which I can recall forty or fifty years ago when I looked up to those men high up above — they are men like the rest of us. But, my friends, they are honest and just. They want to do justice if they can be permitted to.

They will do justice if they are permitted to. This network of meticulous rules that are made by our legislature with honest purpose prevent them from doing justice in the particular case; and the people of our state and of our country understand this. They may not understand the details. They may not know why, but they feel that the pathway of justice is obstructed. They feel that the honest man would better lose his claim than go into court and spend his time and money in the law's pursuit which seems to have no end. And they are indignant over it and restless and dissatisfied over it, and they look to us to do something. Now, what is it ? What can we do ? I can assure you that I have done the best I could for years to try to find some formula, some method by which the thing that the constitutional convention of 1846 did could be done again, for by a different route we have come into the same condition with which they dealt and after most earnest thought, particularly as the result of the discussions in all these bar associations, I have not found anything that offered so much light as the proposal of our judiciary committee.

It is not simple, but show us something better. We must do something. We cannot go home and say to our friends and neighbors we have given you no relief in this matter that concerns you so deeply.

Show us something better than that. What is it ? In the first place it requires the legislature to act upon this report of the commission on statutory consolidation. It does not say how they shall act. We don't undertake to interfere with them in that.

In the second place, it requires them to pass some sort of a brief civil practice act and adopt some sort of rules of procedure; it requires these two divisions. That is following what our neighboring state of Connecticut has adopted. They have a practice act that you can fold up and put in your side

pocket. When the legislature in its wisdom has done that, then two results are provided, one is that the legislature shall stop the eternal tinkering with the practice, stop passing laws which are brought in here by individual members upon a narrow view of the occasion for them; shall stop every year pouring out a stream of amendments, and making new rules to cure the evils of old rules, and shall confine its action to periodical action upon the report of a commission. I agree with the idea that the legislature itself has not the time to elaborate and work out a system. It has too many other things to do. Accordingly the practice has become quite universal of having commissions appointed which shall prepare and present to the legislature well-considered measures. The legislature is given the fullest power; that is, it retains the fullest power to act upon reforms. It does not have to follow the recommendation of the commission. When the commission has reported, the legislature can throw their recommendation out the window if it sees fit; but the action of the legislature is concentrated on the point where it has the report before it, so that it will act upon the subject and not upon the ideas of A today and B tomorrow and C the day after, upon particular rules but it will act upon a system of practice as a whole, upon the report of a commission of its own selection, and it will act once for all until another period has elapsed, and so you stop this meticulous interference with practice, and you have an opportunity to test the provisions which the legislature adopts from time to time on the reports of its commissions. In the meantime the courts are authorized to proceed with their immemorial function of amending and adjusting the rules subject to the practice act of the legislature so that they will contribute to the doing of justice in the individual case and discourage these technicalities and subtleties which tangle justice in the net of form.

Now, there is nothing that cannot be criticised; nothing that cannot be doubted. Of course the judges when they come to make their rules may make rules that Mr. Wickersham would approve and Mr. Brackett would disapprove, or it may be just the other way. But if the judges make rules or amendments to the rules that do not on the whole seem to be right, at the next period, when the legislature takes the subject up, it will put into its practice act a provision that will control the bad rule. This provision reported by the committee is highly meritorious in that it compels the legislature to act in the broad way upon procedure as a whole, and at the same time it enables the legislature to control and correct any tendencies by the court to go wrong in either direction. I have seen and heard of no proposal to accomplish the thing that we clearly must accomplish which seems to be so effective as that proposed by the committee.

COURTS OF JUSTICE FOR SMALL CAUSES

ADDRESS OF AUGUST 23, 1915

The convention having under consideration section 8 of the proposed constitution, relating to the judiciary, and a discussion having arisen as to the territorial jurisdiction and powers of the City Court of the City of New York, Mr. Root said:

I AM not familiar with the situation to which this particular provision applies. I would like to make an observation upon the general subject to which this provision belongs.

It requires continual watchfulness to preserve the courts of small jurisdiction for the trial of the causes of the poor, of men of moderate means, of small business. Their causes are more important to them than the great causes which receive the attention of the press and enlist the services of leaders of the bar in the great courts. Every time, however, that you create a court for the trial of small causes the court immediately sets to work to get its jurisdiction enlarged. It never fails. I speak upon the careful attention growing out of the consideration of this same subject in the judiciary committee of the convention twenty-one years ago. Every court created for the trial of small causes tries to get its jurisdiction enlarged, and when the jurisdiction is enlarged the judges give their attention to the larger causes and neglect the small causes. They would rather be concerned in great affairs than in small affairs; and so, yielding in a good-natured way to the importunities of those gentlemen who wish to enlarge their offices, we gradually destroy court after court intended for the trial of small causes.

I think it was a mistake to increase the jurisdiction of this court from $2,000 to $5,000. I think it would be another mistake to give it full equity jurisdiction. You have got a

court that will deal with the affairs that are small in amount. Keep it; and let it render the service it was created for, instead of allowing it to transform itself into a duplicate Supreme Court. Or, if you do not do that, then you must create another court for the small causes and enlarge that, and create more courts, in unending succession. I think the whole tendency should be resisted.

THE REGULATION OF PUBLIC UTILITIES AND THE DECLINE OF THE "BLACK HORSE CAVALRY"

ADDRESS, AUGUST 25, 1915

In a brief article on legislative corruption, the method of corruption particularly referred to by Mr. Root in the address printed below is thus defined:

> "Strike" bills, or "regulators" which are introduced by legislators attack some interest for the purpose of being bought off. Behind them is frequently to be found a "combine" of members, usually bi-partisan, organized for purposes of plunder. A combine of this nature in New York earned for itself the expressive title of the "Black Horse Cavalry." This body was particularly active in state legislation at the time when Boss Tweed was a state senator and practically in control of the legislature. (*Cyclopedia of American Government*, vol. i, p. 478.)

I SYMPATHIZE very fully with the most of what both Mr. Wickersham and Mr. Wagner have said. I do not think that we are in a position to legislate in detail about the Public Service Commissions, and that we ought to leave that to the legislature which created them.

There is a committee of the state senate, I understand, that is considering that subject.

Mr. WAGNER. Yes, there is.

Mr. ROOT. They know a great deal more about it than I do, and I do not doubt that they know a great deal more about it than most of the members of the convention. The method of exercising the jurisdiction of these commissions is still in the stage of development. But I do not think we should lose the opportunity to put into the constitution enough to make it impossible for any legislature ever to abandon the system of regulating public service corporations through a commission, or commissions, whose business it is to deal with the subject, and to go back to the old method

of leaving public service corporations unregulated, except by the passage of laws in the legislature.

The public service commissions, both in this state and in other states and in the nation, were created to meet and deal with very great and real evils. In this state before we had that system, if a man was unjustly treated by a railroad, he had no recourse, except a lawsuit that was beyond his means, or a complaint to his representative in the legislature. A lawsuit by a single individual of moderate means against one of these great corporations was hopeless. The complaint to his representative in the legislature would result in the introduction of a bill founded upon, perhaps, just complaint, and those bills accumulated. A great deal of the time of the legislature was taken up by them.

The duty of holding these corporations accountable was a burden upon the legislature which it ought not to have been called upon to perform. But, worse than that, this multitude of bills, founded upon just complaint, brought after them a multitude of strike bills introduced for the purpose of holding up the corporations, holding them up and calling them down.

Many of us can now remember the dreadful days of the "Black Horse Cavalry" which came as an incident mainly, to the performance of this duty by the legislature. Further still, the fact that the great transportation companies were being attacked, the great public service corporations were being attacked in the legislature, justified them in their own minds in going into politics and electing, or furnishing the money to elect, members of the senate and assembly. Good men, good citizens, honest, law-abiding men justified themselves in the directorates of these railroads and other public service corporations in spending the money of the corporation to elect senators and assemblymen who would protect them against strike bills. The whole system became a scandal and a disgrace, and it was to remedy that here in New York and

all over the country that this system of regulation by a commission created by law was established.

The results have been most beneficent. No greater reform has been wrought in the public life of our country than has been wrought by the transfer of this attempt to regulate these great corporations from the legislative bodies of the country to public service commissions. Now if a poor fellow is injured by a railroad company, he has somebody to go to, and the company can be held accountable. Now there is no cloud of strike bills in the legislature. Now there is no justification for the New York Central or the Erie or the Delaware and Hudson or the electric light companies or the telegraph or telephone companies to go into politics and spend their money with the idea that they must protect themselves in the legislature.

We can regard with greater respect the government of our state than we could. We never should permit a return to the old and vicious system. We should not now lose the opportunity to make the return impossible, because men forget. The generation that knew the old, evil days of the "Black Horse Cavalry" is passing away, and when it is gone a new generation which knows not the cause for the creation of this system will arise; and, ignorant of the evils to which they would be returning by destroying it, they may wipe it out. So I hope that we, who know the reason for the creation of this system of regulation by commission will put into this constitution enough, just enough, to make it impossible for any legislature ever to destroy it and return to the old, evil days, leaving the real legislation for the further development of the system to the legislature.

INVISIBLE GOVERNMENT

SPEECH ON THE SHORT BALLOT AMENDMENT, AUGUST 30, 1915

In the states of the American Union, most of the public officers are elected by popular vote. As candidates for the elective positions are nominated by the different parties, and as the names of all the candidates are printed on one and the same ballot, the ordinary voter finds himself in the presence of many names, among which he must select if he wishes the election of a particular person instead of the election of the party ticket. The idea of the so-called short ballot is to restrict the number of officers to be elected by the people at any one election, in order that the voters may concentrate their attention upon a few candidates and thus select those believed to be best qualified for the positions; to allow the officers thus elected to appoint other public officers, and to hold the elected officers responsible not only for their own conduct, but for the selection and conduct of their appointees. It is believed by the advocates of the short ballot that by this method some of the evils of what has come to be called " Invisible Government " will be eliminated.

In behalf of the short ballot, and of honest, open government, Mr. Root delivered the following address:

I HAVE had great doubt whether or not I should impose any remarks on this bill upon the convention, especially after my friend, Mr. Quigg, has so ingeniously made it difficult for me to speak; but I have been so long deeply interested in the subject of the bill, and I shall have so few opportunities hereafter, perhaps never another, that I cannot refrain from testifying to my faith in the principles of government which underlie the measure, and putting upon this record, for whatever it may be worth, the conclusions which I have reached upon the teachings of long experience in many positions, through many years of participation in the public affairs of this state and in observation of them.

I wish, in the first place, to say something suggested by the question of my friend, Mr. Brackett, as to where this short ballot idea came from. It came up out of the dark, he says.

Let us see. In 1910, Governor Hughes, in his annual message, said this to the legislature of the state: "There should be a reduction in the number of elective offices. The ends of democracy will be better attained to the extent that the attention of the voters may be focussed upon comparatively few offices, the incumbents of which can be strictly accountable for administration. This will tend to promote efficiency in public office by increasing the effectiveness of the voter and by diminishing the opportunities of political manipulators who take advantage of the multiplicity of elective offices to perfect their schemes at the public expense. I am in favor of as few elective offices as may be consistent with proper accountability to the people, and a short ballot. It would be an improvement, I believe, in state administration if the executive responsibility was centered in the governor, who should appoint a cabinet of administrative heads accountable to him and charged with the duties now imposed upon elected state officers."

Following that message from Governor Hughes, to whom the people of this state look with respect and honor, a resolution for the amendment to the constitution was introduced in the Assembly of 1910. That resolution provided for the appointment of all state officers, except the governor and the lieutenant-governor.

There was a hot contest upon the floor. Speaker Wadsworth, came down from the speaker's chair to advocate the measure, and Jesse Phillips, sitting before me, voted for it. And so, in the practical affairs of this state, the movement out of which this bill came had its start upon the floor of the state legislature.

Hughes and Wadsworth, one drawing from his experience as governor and the other upon his observation of public affairs, from the desk of the speaker of the assembly, were its sponsors.

Time passed, and in 1912 the movement had gained such headway among the people of the state that the Republican convention of that year declared its adherence to the principle of the short ballot, and the Progressive convention, in framing its platform, under which two hundred thousand — it is safe, is it not, to say two hundred thousand — of the Republican voters of this state followed Roosevelt as their leader, rather than Taft; the Progressive convention, in framing its platform, declared: "We favor the short ballot principle and appropriate constitutional amendments."

So two parties, and all branches of the Republican party at least, committed themselves to the position that Hughes and Wadsworth took, in the Assembly of 1910.

In 1913, after the great defeat of 1912, when the Republicans of the state were seeking to bring back to their support the multitudes that had gone off with the Progressive movement; when they were seeking to offer a program of constructive forward movement in which the Republican party should be the leader, Republicans met in a great mass meeting in the city of New York, on the fifth of December of that year, 1913.

Nine hundred and seventy Republicans were there from all parts of the state. It was a crisis in the affairs of the Republican party. The party must commend itself to the people of the state, or it was gone. Twenty-eight members of this convention were there, and in that meeting, free to all, open to full discussion, after amendments had been offered, discussed and voted upon, this resolution was adopted:

WHEREAS, This practice [referring to the long ballot] is also in violation of the best principles of organization which require that the governor, who under the constitution is the responsible chief executive should be so in fact, and that he should have the power to select his official agents;

Therefore, be it *Resolved*, that we favor the application to the state government of the principle of the short ballot, which is that only those

offices should be elective which are important enough to attract (and deserve) public examination.

And be it further *Resolved*, that, in compliance with this principle, we urge the representatives of the Republican party of this state, in the senate and assembly, to support a resolution providing for the submission to the people of an amendment to the constitution, under which amendment it will be the duty of the governor to appoint the secretary of state, the state treasurer, the comptroller, the attorney-general, and the state engineer and surveyor, leaving only the governor and lieutenant-governor as elective state executive officers.

That resolution, I say, after full discussion was unanimously adopted by the nine hundred and seventy representative Republicans who had met there to present to the people of the state a constructive program for the party. Mr. Frederick C. Tanner is chairman of this Committee on Governor and Other State Officers today, because it was he who offered the resolution in that meeting that was unanimously approved by those nine hundred and seventy Republicans. He is executing a mandate. He is carrying out a policy. He is fulfilling a pledge to the people.

The time went on and the following winter, in the Assembly of 1914, a new resolution was introduced following the terms of this resolution of the mass meeting, following the terms of the Hughes-Wadsworth resolution of 1910, providing that all these state officers except the governor and lieutenant-governor should be appointed. That resolution passed the assembly and every Republican in the assembly voted for it. It never came to a vote in the senate. Voting for that resolution were four members of the assembly, who now sit in this convention: Mr. Bockes, Mr. Eisner, Mr. Hinman, and Mr. Mathewson.

Time passed on and in the autumn of 1914 a Republican convention met at Saratoga; an unofficial convention, we are told. Unofficial? Negligible! Here is the law under which it was called, Section 45 of the election law:

'Nothing contained in this chapter shall prevent a party from holding party conventions to be constituted in such manner and to have such powers in relation to formulating party platforms and policies and the transaction of business relating to party affairs as the rules and regulations of the party may provide, not inconsistent with the provisions of this chapter.

That convention was thus called more specifically and solemnly to frame a platform than any other convention that ever met in this state, for that was its sole business. That is what it was there for; to define, to declare, to set before the people the faith and policies of the Republican party; and in that convention there was a report from the Committee on Rules, which embodied deliberation, full discussion and mature judgment, such as no report that ever came to a political convention within my experience ever had. The great mass meeting of December 5, 1913, had directed the appointment of a Committee of Thirty to meet and consider and prepare for submission to the convention a statement of the views of the Republican party regarding the new constitution. That committee was appointed; it met two or three days before the convention in the city of Saratoga. It met in the office of my friend, Mr. Brackett, and there day after day it discussed the subject, reached and voted upon its conclusions and framed a report.

Let me say here, that Senator Brackett never agreed with the committee. He has been consistent and honest and open in the declaration of his views from first to last, but he was voted down in the Committee of Thirty. Their report favoring a short ballot, among other things, was presented to the convention. That report was referred to the Committee on Resolutions of the convention, a committee of forty-two members, among them twelve members of this convention, and that Committee on Resolutions took up the report of the Committee of Thirty and discussed it all day and they voted upon it, and again Mr. Brackett's view

was voted down; and the Committee on Resolutions reported to the convention the plank in favor of the short ballot that has been read to you.

Mr. BRACKETT. Will the Senator permit an interruption? I know you have not intentionally made a misstatement, but you will recall that a report of the Committee of Thirty was not presented to the Committee on Platform until an hour before the convention, in the little room at the end of the piazza — before the convention met.

Mr. ROOT. It is a fact, and that room was the scene of excited and hot controversy for a long period over the adoption of that report, which was in part adopted and in part rejected.

Mr. BRACKETT. If you will pardon a suggestion, you said for a long period. It was, I think, about an hour and a half.

Mr. DEYO. Will the gentleman give way? I think that lasted until the following day.

Mr. ROOT. It did.

When it came to the convention, there was no doubt about the subject we were talking on. The temporary chairman of the convention had said to the convention, "The reflections which arise from considering the relations of the executive and the legislature lead inevitably to another field of reform in state government. That is, the adoption of the short ballot. That is demanded both for the efficiency of our electoral system, and for the efficiency of government after election." And then, after stating the first, he proceeded: "The most obvious step toward simplifying the ballot in this state is to have the heads of executive departments appointed by the governor, etc. Still more important would be the effect of such a change upon the efficiency of government. The most important thing in constituting government is to unite responsibility with power,

so that a certain known person may be definitely responsible for doing what ought to be done; to be rewarded if he does it and punished if he does not do it, and that the person held responsible shall have the power to do the thing. Under our system we have divided executive power among many separately elected heads of departments, and we have thus obscured responsibility, because in the complicated affairs of our government it is hard for the best informed to know who is to be blamed, or who is to be praised, who ought to be rewarded or who punished. At the same time that the governor is empowered to appoint the heads of executive departments and made responsible for their conduct, there plainly ought to be a general reorganization of the executive branch of our government."

After that, Mr. Chairman, came the report of the Committee on Resolutions, and Mr. Brackett submitted a minority report, taking substantially the position which he has taken here. That minority report was read, and it was argued at length. Amendments were offered and discussed. Mr. Brackett, I repeat, was heard at length upon it, in what he then called the " great council of the party ", and he was beaten; beaten fighting manfully for his opinions, but he was beaten. The Republican party went to the people at the coming election upon the declaration that it was in favor of applying the principle of the short ballot to the selection of executive officers.

Let me turn to the other side of the story. When the resolution for the short ballot, simon-pure, making all the state officers but the governor and lieutenant-governor appointive, was before the Assembly of 1914, Mr. A. E. Smith, the member of this convention whose attractive personality has so impressed itself upon every member, moved an amendment to limit the change to appointment of the secretary of state, state engineer and surveyor and

state treasurer, leaving the comptroller and attorney-general elective. Upon that amendment the Democrats of the assembly stood, voting with him. When the Democratic convention met in that autumn they put themselves on Mr. Smith's platform, approved his action and that of the Democrats in the assembly and declared in favor of exactly what he called for in his amendment — the election of the comptroller and the attorney-general and the appointment of all the other officers.

So you have this movement, not coming up out of the dark, but begun by a great Governor and advocated by a great Speaker, both of whom have received the approval of their country, one by being elevated to the bench of the Supreme Court of the United States and the other to the Senate of the United States. You have the movement progressing step by step until it has received the almost universal assent, the final and decisive action of the party to which that Governor and that Speaker belong, repeated over and over and over again, fully thought out and discussed; and you have the other party accepting the principle, agreeing to the application of it, with the exception of the comptroller and the attorney-general.

Now, we must vote according to our consciences. We are not bound — no legislative body is bound legally by a platform. But, Mr. Chairman, if there is faith in parties, if there is ever to be a party platform put out again, to which a man can subscribe or for which he can vote without a sense of futility, without a sense of being engaged in a confidence game; if all the declarations of principle by political parties are not to be regarded as false pretense, as humbug, as a parcel of lies, we must stand by the principles upon which we were all elected to this convention. There is one thing, and, in so far as I know, only one thing, that the vast majority of us have assured the people who elected us we would do in

this convention, and that is that we would stand by the position of Hughes and Wadsworth. I, for one, am going to do it. If I form a correct judgment of the self-respecting men of this convention, it will be with a great company that I do it.

But, Mr. Chairman, do not let us rest on that. Why was it that these conventions, one after another, four of them, declared to the people that they were for the principle of this bill? In the first place, our knowledge of human nature shows us that the thousands of experienced men in these conventions and meetings had come to the conclusion that that principle met with the opinion of the people of the state. It is all very well for Mr. Quigg to tell us what the men he met in Columbia county said, for Mr. Green to write letters to his friends in Binghamton, but nine hundred and seventy men in that mass meeting on the fifth of December told you what their observation was, that they would commend their party to the people of this state by declaring this principle. A thousand and odd men in the Republican conventions of 1912, 1913, and 1914 have given proof conclusive of what their observation of public opinion was. A thousand and odd men in the Democratic convention of 1914 have given proof conclusive of what their observation of public opinion was. Conventions do not put planks in platforms to drive away votes.

Again I ask, why was it that they thought that these principles would commend their tickets to the people of the state? Why was it that the people of the state had given evidence to these thousands of experienced men in the politics of the state that those principles would be popular? Well, of course, you cannot escape the conclusion that it was because the people of the state found something wrong about the government of the state. My friend, Mr. Brackett, sees nothing wrong about it. He has been for fifteen years

in the Senate; I suppose he could have stayed there as long as he wanted to. He is honored and respected and has his own way in Saratoga county. Why should he see anything wrong ? My friend, Mr. Green, is comfortably settled in the Excise Department, and he sees nothing wrong. Mr. Chairman, there never was a reform in administration in this world which did not have to make its way against the strong feeling of good, honest men, concerned in existing methods of administration, and who saw nothing wrong. Never! It is no impeachment to a man's honesty, his integrity, that he thinks the methods that he is familiar with and in which he is engaged are all right. But you cannot make any improvement in this world without overriding the satisfaction that men have in the things as they are, and of which they are a contented and successful part. I say that the growth, extension, general acceptance of this principle shows that all these experienced politicians and citizens in all these conventions felt that the people of the state saw something wrong in our state government, and we are here charged with a duty, not of closing our eyes, but of opening them, and seeing, if we can, what it was that was wrong.

Anybody can see that all these one hundred and fifty-two outlying agencies, big and little, lying around loose, accountable to nobody, spending all the money they can get, violate every principle of economy, of efficiency, of the proper transaction of business. Every one can see that all around us are political organizations carrying on the business of government, that have learned their lesson from the great business organizations which have been so phenomenally successful in recent years.

The governments of our cities: why, twenty years ago, when James Bryce wrote his *American Commonwealth*, the government of American cities was a byword and a shame for Americans all over the world. Heaven be thanked, the

government of our cities has now gone far toward redeeming itself and us from that disgrace, and the government of American cities today is in the main far superior to the government of American states. I challenge contradiction to that statement. How has it been reached ? How have our cities been lifted up from the low grade of incompetency and corruption on which they stood when the *American Commonwealth* was written ? It has been done by applying the principles of this bill to city government, by giving power to the men elected by the people to do the things for which they were elected. But I say it is quite plain that that is not all. It is not all.

I am going to discuss a subject now that goes back to the beginning of the political life of the oldest man in this convention, and one to which we cannot close our eyes, if we keep the obligations of our oath. We talk about the government of the constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this state ? What has it been during the forty years of my acquaintance with it ? The government of the constitution ? Oh, no; not half the time, nor half way. When I ask what do the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes back to the public feeling of resentment against the control of party organizations, of both parties and of all parties.

Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton, and Conkling, and Arthur, and Cornell, and Platt, from the days of David B. Hill, down to the present time, the government of the state has presented two different lines of activity, one of the constitutional and

statutory officers of the state, and the other of the party leaders, — they call them party bosses. They call the system — I do not coin the phrase, I adopt it because it carries its own meaning — the system they call "invisible government." For I do not remember how many years, Mr. Conkling was the supreme ruler in this state; the governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not, did not count. It was what Mr. Conkling said; and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was not any elected officers; it was Mr. Platt. And the capitol was not here; it was at 49 Broadway; with Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. Ah! My friends here have talked about this bill's creating an autocracy. The word points with admirable facility the very opposite reason for the bill. It is to destroy autocracy and restore power so far as may be to the men elected by the people, accountable to the people, removable by the people. I don't criticise the men of the invisible government. How can I? I have known them all, and among them have been some of my dearest friends. I can never forget the deep sense of indignation I felt in the abuse

that was heaped upon Chester A. Arthur, whom I honored and loved, when he was attacked because he held the position of political leader. But it is all wrong; it is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

How is it accomplished? How is it done? Mr. Chairman, it is done by the use of patronage, and the patronage that my friends on the other side of this question have been arguing and pleading for in this convention, is the power to continue that invisible government against that authorized by the people. Everywhere, sir, that these two systems of government co-exist, there is a conflict day by day, and year by year, between two principles of appointment to office, two radically opposed principles. The elected officer or the appointed officer, the lawful officer who is to be held responsible for the administration of his office, desires to get men into the different positions of his office who will do their work in a way that is creditable to him and his administration. Whether it be a president appointing a judge, or a governor appointing a superintendent of public works, whatever it may be, the officer wants to make a success, and he wants to get the man selected upon the ground of his ability to do the work.

How is it about the boss? What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office; and to substitute the idea that men should be appointed to office for the preservation and enhancement of power of the political leader. The one, the true one, looks upon appointment to office with

a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it.

Gentlemen of the convention, I appeal to your knowledge of facts. Every one of you knows that what I say about the use of patronage under the system of invisible government is true. Louis Marshall told us the other day about the appointment of wardens in the Adirondacks, hotel keepers and people living there, to render no service whatever. They were appointed not for the service that they were to render to the state; they were appointed for the service they were to render to promote the power of a political organization. Mr. Chairman, we all know that the halls of this capitol swarm with men during the session of the legislature on pay day. A great number, seldom here, rendering no service, are put on the payrolls as a matter of patronage, not of service, but of party patronage. Both parties are alike; all parties are alike. The system extends through all. Ah, Mr. Chairman, that system finds its opportunity in the division of powers, in a six-headed executive, in which, by the natural workings of human nature, there shall be opposition and discord and the playing of one force against the other; and so, when we refuse to make one governor elected by the people the real chief executive, we make inevitable the setting up of a chief executive not selected by the people, not acting for the people's interest, but for the selfish interest of the few who control the party, whichever party it may be.

Think for a moment of what this patronage system means. How many of you are there who would be willing to do to your private client, or customer, or any private trust, or to a friend or neighbor, what you see being done to the state of New York every year of your lives in the taking of money out of her treasury without service? We can, when we are in a private station, pass on without much attention to

inveterate abuses. We can say to ourselves, I know it is wrong, I wish it could be set right; it cannot be set right, I will do nothing. But here, here, we face the duty, we cannot escape it, we are bound to do our work, face to face, in clear recognition of the truth, unpalatable, deplorable as it may be, and the truth is that what the unerring instinct of the democracy of our state has seen in this government is, that a different standard of morality is applied to the conduct of affairs of state than that which is applied in private affairs. I have been told forty times since this convention met that you cannot change it. We can try, can we not? I deny that we cannot change it. I repel that cynical assumption which is born of the lethargy that comes from poisoned air during all these years. I assert that this perversion of democracy, this robbing democracy of its virility, can be changed as truly as the system under which Walpole governed the commons of England, by bribery, as truly as the atmosphere which made the *Crédit Mobilier* scandal possible in the Congress of the United States, has been blown away by the force of public opinion. We cannot change it in a moment, but we can do our share. We can take this one step toward, not robbing the people of their part in government, but toward robbing an irresponsible autocracy of its indefensible and unjust and undemocratic control of government, and restoring it to the people to be exercised by the men of their choice and their control.

Mr. Chairman, this convention is a great event in the life of every man in this room. A body which sits but once in twenty years to deal with the fundamental law of the state, deals not only for the present but for the future, not only by its results but by its example. Opportunity knocks at the door of every man in this assemblage, an opportunity which will never come again to most of us. While millions of men are fighting and dying for their countries across the

ocean, while government is become serious, sober, almost alarming in its effect upon the happiness of the lives of all that are dearest to us, it is our inestimable privilege to do something here in moving our beloved state along the pathway towards better and purer government, a more pervasive morality and a more effective exercise of the powers of government which preserve the liberty of the people. When you go back to your homes and recall the record of the summer, you will find in it cause for your children and your children's children, who will review the convention of 1915 as we have been reviewing the work of the preceding conventions, to say: my father, my grandfather, helped to do this work for our state.

Mr. Chairman, there is a plain old house in the Oneida hills, overlooking the valley of the Mohawk, where truth and honor dwelt in my youth. When I go back, as I am about to go, to spend my declining years, I mean to go with the feeling that I have not failed to speak and to act here in accordance with the lessons I learned there from the God of my fathers. God grant that this opportunity for service to our country and our state may not be neglected by any of the men for whom I feel so deep a friendship in this convention.

SPEECH ON CLOSING THE CONVENTION

SEPTEMBER 10, 1915

At the closing session of the convention of 1915, and after delivery of the address below, the following tribute to Mr. Root, as its presiding officer, was unanimously adopted:

Resolved, That the thanks of this convention be tendered to the Honorable Elihu Root for the ability, fairness and courtesy which have distinguished his services as president of this convention.

OUR work is done. The long, hard months during which we have been wrestling with questions of government, and character has been struggling with character in the discussions of the proposed amendments to the constitution, are over. We have produced a revised constitution which is not a model of style, of form, of brevity, of theoretical perfection. Any one of us with the models which are available, could have produced in the solitude of his own office a more perfect and harmonious scheme of government; but this instrument is fitted by patience, experience, knowledge and effort, to the actual conditions of the life of a people which has been growing for three centuries, of a people living one half upon the sea and the other half in the river valleys and among the hills and on the shores of the Great Lakes, of a people of ten million with varied industries and interests and prepossessions and prejudices and sympathies; and to know the full meaning of all the provisions which this instrument contains one must have studied and know the life of the people of all the great state of New York. When we came to our work on the sixth of April last, we addressed ourselves first to studying the conditions of the government of the state. We found that there were serious evils which had resulted in an enormous increase of expenses from twelve million

dollars at the time of the last convention to forty-two million dollars at the time of our meeting; an enormous increase of indebtedness and an apparent impossibility of meeting all attempts to curtail expenses or to prevent the further accumulation of debt. Upon further inquiry we found that the executive and administrative organization of the state was loose, confused, ill-regulated; that one hundred and fifty and more separate agencies were going about the business of government, responsible to no one in particular, each one spending all the money that it could get, and there was no such concentration of responsibility and power as was necessary to bring to accountability the agencies of the state which were plunging our people into extravagance and debt. We found that the legislature of the state had declined in public esteem and that the majority of members of the legislature were occupying themselves chiefly in the promotion of private and local bills, of special interests, with which they came to Albany, private and local interests upon which apparently their reëlections to their positions depended, and which made them cowards, and demoralized the whole body. We found that the course of justice was slow and expensive and hindered by technicalities and subtleties which kept honest men out of their rights. We found that the great offices, the hundreds of offices of the state were swarming with men who held sinecures, who were put in their places for the benefit of particular organizations and not for the services that they were to render to the state. We have done our best to devise and adopt measures which will remedy these evils. When one's automobile acts strangely and goes wrong, one does not berate it or pass resolutions about it; one endeavors to put one's finger on the fault in the machinery and correct the fault. The capacity of a people for self-government is measured by their ability to create and maintain institutions that will govern. With-

out the institutions of government there can be no government, for the vote alone accomplishes nothing, but in the creation of an active agent. We were elected by the people of the state to overhaul the machinery of government, to ascertain if we could where in that complicated mechanism lay the fault that caused the evils under which they suffered. We have done the best we could. We have given our best brain, our best strength, our best devotion to the accomplishment of that duty and now we submit our work to the people of the state, and we ask of them only this: As we have been your loyal and devoted servants, doing your behest to the best of our ability, be loyal to us and give at least a presumption in favor of the work that we have done. If you find it wrong, reject it; but do not reject it upon light or unconsidered reasons, for it is the best that your representatives, elected by you, devoting themselves for all this long summer to the work, can do to cure the evils of your government.

There are two special things which I wish to say before the close of this convention. One is — and I would like to say it to every citizen of the state — one is that this convention has risen above the plane of partisan politics. It has refused to make itself or permit itself to be made the agency of party advantage except as faithful service for the state is a benefit to party. It has refused to engage in the play of politics. No caucus and no conference has marred the impartiality of our proceeding. No resolution has bound the judgment or conscience of any member of this convention. Our conception of our duty was to leave behind strife of party, and upon the higher plane of patriotism and love of country, to join all together, whatever our parties, in doing the best we could for the prosperity of our beloved state. One effect of this course of conduct on our part has been that the debates of this convention compare most favorably

with the debates of any parliamentary body which has sat in deliberation during the lifetime of any man in this room. I have seen and heard the debates of many parliamentary bodies and never have I heard or read debates in which the matter was more relevant, the discussion more earnest and to the point, the attempts at display less conspicuous, the speeches for home consumption more infrequent, and real discussion, that real open, public discussion of a deliberative body, which is the essential process of free self-government, on a higher level than in this convention of the year 1915.

And another result of this course of conduct has been that the thirty-three measures adopted by the convention have been adopted by these astonishing votes: Twelve of the measures were adopted unanimously; twelve were adopted by majorities of more than ten to one; of the remaining nine, two were adopted by majorities of more than seven to one, two by majorities of more than four to one, two by majorities of more than three to one, and three by majorities of more than two to one. That, in an assemblage composed of two different and perennially conflicting parties was the result of common patriotic contributions by the members of both parties towards the perfection of measures in a convention which was doing its work with a sense of the dignity of the people it represented, and not for party advantage.

All the great measures of this convention were adopted not only by the votes, the affirmative votes of a majority of the Republicans but by the affirmative votes of a majority of the Democrats in the convention. The executive reorganization plan, commonly called the short ballot, was adopted by the votes of ninety-seven Republicans in the affirmative and fifteen in the negative, and of twenty-eight Democrats in the affirmative and fifteen in the negative. The budget, that great new departure in the finance of the

state, was adopted by the affirmative vote of one hundred and one Republicans to two Republicans in the negative and of thirty-six Democrats in the affirmative to two in the negative. The city home rule bill was adopted by one hundred and two Republicans voting in the affirmative and two in the negative; by eighteen Democrats voting in the affirmative and fifteen in the negative. The county home rule bill, which completes the scheme, was adopted by ninety-one Republicans voting in the affirmative and nine in the negative; and thirty-seven Democrats voting in the affirmative and two in the negative.

The judiciary bill, that great measure which prescribes the reform in judicial procedure that in the best judgment of this convention will give the honest man the chance for his rights, was adopted by the affirmative vote of one hundred and three Republicans to one Republican in the negative and thirty-two Democrats to two Democrats in the negative. So that in substance, upon the great measures of this convention both parties of the state are united, both have given their suffrages in favor of the reforms that we propose.

One other thing I wish to say, and that is that similar evils to those we have found in our state government have been found in the governments of many other states. People of those states have had recourse to an abandonment or a partial abandonment of representative government. They have had recourse to the initiative and referendum and the recall, the recall of officers and the recall of decisions. In this convention we have offered the most irrefutable, concrete argument against those nostrums and patent medicines in government and in favor of the preservation of that representative government which is the chief gift of our race to freedom, by undertaking to reform representative government, instead of abandoning it and to make it worthy of its great function for the preservation of liberty.

This constitution is not a matter of little prejudices or oppositions. It is not a business to be decided accordingly as one is opposed to raising this salary or that, or to extending the workmen's compensation or restricting it, or to making a little change in this office or that. It is to be decided upon great lines for it is a great work. It is a great departure in government. It is the best that the men selected by the people of the Empire State, to do the work for them, can do towards rescuing the representative government of our fathers from the obloquy which has come upon it in recent years. These great measures of the reorganization of the executive, of the new method of state finances, of the relief of the legislature from those petty preoccupations of local and private bills, which have been destroying its morale, of the establishment of the privileges and blessings of local self-government for the cities and for the counties of the state, of reform in judicial procedure, all these are great measures which should appeal to a great people who are competent to maintain the perpetuity of representative self-government. And upon those great lines I feel assured you may be confident the people's verdict will be cast.

Now, gentlemen of the convention, I bid you farewell with assurance of respect and esteem and affection. We have labored long together in a common cause, and I am sure we shall all carry to our homes the inestimable reward of faithful service in the possession of a host of brothers, children of our common country, devoted to the same cause, and loving each other as brother Americans. So I declare the constitutional convention of the state of New York of the year 1915 to be adjourned without day.

A STUDY OF THE PROPOSED CONSTITUTION

ADDRESS AT A DINNER OF THE REPUBLICAN CLUB OF NEW YORK, OCTOBER 18, 1915

After the adjournment of the constitutional convention of 1915 on September 9, Mr. Root delivered a series of carefully prepared addresses before representative bodies, advocating the adoption of the constitution of the state as amended. Of this series, two have been selected for publication; the first delivered before the Republican Club of New York, October 18, 1915; the second a week later, before the Economic Club of New York.

I NEED not tell you, I cannot tell you, how deeply I am affected by this warmth of greeting and this assurance of the endurance of old friendship. It is just about twenty years since you did me the honor to make me the president of this club, immediately following the constitutional convention of 1894. And now, after twenty years of life, with its struggles, with its expense of energy, with all the writing of life into the history of our state and our country, we have come again to the close of another constitutional convention, and you are greeting me once again with the warmth and loyalty of friendship that forbids any man to say that the people of a republic are ungrateful, or that the generous emotions and the loyal sentiments of true friendship are not a mighty power, transcending the materialism and the selfishness in the race for advantage and for property and for fame in this Republic. We have met many times, my friends, following the standard of some admired and beloved leader; often we have fought together to carry the standard of the party to victory, often we have gathered resolution in defeat to advance again for victory in the next election. The interests of personality, of living issues that immediately and directly affect our own fortunes, and the welfare of our

communities, have been with us plain, and clear, and vivid when we have met before. We have sought to make our friend our leader, governor or president; but now we have a cold, dry, uninteresting question: A constitution of the state, prolix and complicated, with matters of dull governmental machinery affected, little or nothing to cause excitement, little or nothing to awaken public interest; yet, my friends, the issue, the cold, dry, uninteresting issue that is before us now transcends the interest and the importance of any success of any man in any election for which we have striven. We have passed in America that happy period of youth in which we could make mistakes without suffering for them. We have passed that condition of simple governmental affairs when any one could do anything under any system, and the vast complication and difficulty of our government is pressing home upon the welfare and the happiness and the liberty of our people. The test of capacity for self-government is to be found in the people's ability to create institutions which will at once preserve liberty and maintain order.

For five months and something more, a body of men, elected by the people of the state of New York, two-thirds of them Republicans, some of them elected in the state at large, holding their places by over one hundred thousand majority, have been applying themselves and laboring to reach just conclusions of the utmost importance upon the government of the state. They have produced a constitution as the result of listening to many witnesses, of securing much advice, of long and thorough study, of complete and full discussion, of reconciliation of views, of subordination of the less important to the more important; and this has resulted in a revised constitution of the state. It is not a thing of shreds and patches, it is not a thing to be considered according to the individual predilections of this man or that upon this particular subject or the other; it is a whole, a

complete rounded whole, and, as a whole, the determination of the people of the state upon it is the most grave and serious determination which the people of the state have had to meet in many a decade.

Let me, if I can within the brief limits possible to such an occasion, try to state what it is. When the constitutional convention delegates, whom you elected, addressed themselves to considering the government of the state, they found that there were serious defects in all three branches of our government.

Our judicial procedure was complicated, technical and full of subtleties, and with a multitude of statutory provisions relating to procedure, which made it difficult for a plain and honest man to come into court and get his rights. The procedure had been built up by year after year of separate and specific code provisions and code amendments, which, taken all together, have created a multitude of statutory rights in the way of procedure that make it almost impossible for a litigation to be brought to a prompt and inexpensive conclusion.

We found that the executive branch of our government was ill-compacted, confused, extravagant, subject to no effective control; over one hundred and fifty agencies, great and small, all over the state, were carrying on business, and were responsible, practically, to no one. Every one spent all the money he could get, every one acted in accordance with his own judgment. Good men, honest men, trying to do their duty, but none of them held to responsibility or subject to the effective control and limitations of inspection and supervision.

We found that the legislature had declined in public esteem; we found that the members of the legislature, a very large proportion of them, were going to Albany with local and private bills, and special interests which they

wished to subserve, and that every man who had a special bill and a special interest was made a coward and prevented from doing his duty toward the general interests of the state.

We found that the continually increasing tendency of the legislature to exercise its powers for the playing of politics, was making our government the means of securing personal advantage, personal appointments to office, personal appropriations out of the treasury of the state; and we sought, with all sincerity and earnestness within our power, to find remedies for those evils in the three great departments of the state.

We sought to deal with one by requiring the legislature again, as the constitutional convention of 1846 did, to return to simplicity and effectiveness of procedure in the attainment of justice. We undertook to require the legislature to pass a brief and simple practice act, and sweep away all this great body of statutory rights in procedure and leave the regulation of the rules under the general provisions of the practice act to the courts, so that our judges on the bench would be permitted to do justice in the particular case, instead of making men run the gauntlet of these acute and subtle and technical barriers to the attainment of their rights, which have been a disgrace to the administration of justice in this state.

In the executive department, we sought to apply the rule of responsibility, and to give men who are elected by the people the power which would make it possible to hold them responsible. We undertook to condense all those one hundred and fifty-two agencies of the state into seventeen departments; we undertook to require that the overlapping and the interference, and the useless expenditure of money should be done away with, by putting all those agencies into a limited number of departments, under one head that would

be responsible and that could be held responsible by the governor of the state who himself can be held responsible by the people of the state because they will have given him power upon which they can hold him responsible.

And we undertook to rehabilitate the legislature of the state, not by any one provision — that was impossible — but by a series of provisions, and that is the central idea of the whole constitutional scheme included in this revision. In the first place, we found the legislature making up the appropriation bills, making them up in the dark, with suggestions for appropriations coming to the committees in private, in secret, coming from every one, responsible or irresponsible, coming from the members of the legislature themselves, each one wanting something, each one trying to get something for his constituency, appropriation bills brought out late in the session, running along on the calendar until the close of the session, and then, under an emergency passage, not printed, not discussed, not understood, passed by the legislature, then the legislature adjourning and the governor left with thirty days in which to sit down in the privacy of his office, with a blue pencil, and control the action of the legislature. That system was a complete reversal of the true and traditional system of representative government, under which the representatives of the people are to hold the purse strings. The governor was made to hold the purse strings, and the representatives of the people, instead of controlling expenditure, ran pell-mell to increase it. We have reversed it. We have taken this procedure, which stood on its head, turned it around and stood it on its feet and we have required, first, the heads of all those departments, the seventeen of them, who are now to be responsible, in the place of the one hundred and fifty-two, we have required them to furnish the governor in ample time a statement of the needs of their departments, to arrange them in the order

of their importance, to be responsible for that statement, and then we have required the governor to revise these statements and cut them down, or hold himself responsible for the amounts. And we have required the governor, early in the session, to lay the statements of the needs of the executive departments of the whole state government before the legislature side by side with a statement of the resources of the state from which the appropriations are to be paid. And we have put the legislature in a position where, instead of making up a statement of appropriations in the dark, they are bound to deal with the governor's statement of appropriations in public, not to increase them, but to cut them down if they will, or refuse them if they will. And we have given them the right to have the governor and the heads of departments come before them that they may be interrogated as to why they want the money, what they want it for, why they have to have so much.

And so we have restored the legislature of the state to the legislative function of a representative assemblage in holding the purse strings.

People talk about its increasing the power of the governor. It increases the responsibility of the governor and it increases the power and restores the true function of the legislature.

More than that, the great weakness of our legislature is in these private interests that particular members of the legislature go to Albany to subserve; the local bills, which make cowards of them all; and we have drawn a ring around them, and we have deprived the legislature, we have relieved the legislature of their temptations.

By the home rule provision we have put the initiative as to special and local bills affecting the cities of the state in the local legislatures and so the members of our legislature will no longer go to Albany each with his special bill that

he has to get through as a condition of being continued in office in that body. All special local legislation is swept away. We have done the same things as to the counties, by a provision that the legislature shall pass no bills relating to counties except upon the initiative of the counties, the county authorities; two things of which we have relieved the legislature. We have also relieved it of the multitude of code amendments which come up, each individual coming up with an amendment that he wants for some particular litigation in his own region. We have relieved it from that temptation to turn aside from its proper duties by requiring this brief and simple practice act and leaving the rest to the rules of court, and prohibiting the legislature from amending the code except at intervals of not less than five years, upon the report of a commission appointed by themselves. We have relieved the legislature of the great multitude of bills for game laws, local to the last degree, making the game laws in every county different from every other county, by providing for a body of nine conservative commissioners, following the plan of the university of the state, with the regents, who, since 1784, have controlled our education. These are four other ways in which we have relieved the legislature.

We have cut off by positive prohibition all that class of bills authorizing the proving of claims against the state, bills by which it is commonly sought to evade the prohibition against legislative auditing of claims. That is another. We have cut off the flood of local improvement bills by prohibiting the passing of any bill for the use of the state's money in building a culvert in your district, or a bridge in yours, or an embankment in yours, unless there is filed a plan and an estimate of the cost and a certificate by the superintendent of public works as to whether the interests of the state at large require the improvement to be made.

And now when the members of the legislature come to Albany, they will have practically nothing to do but to attend to the public business, to deal with general laws of the state, to stand against extravagant expenditure in the appropriation bills. We have cut off the right of emergency messages, which had made the old provision of the constitution of 1894 prohibiting a bill from being passed until it had been for three days in print in its final form, of no avail, because there would come in an emergency message declaring that the public interests required the immediate passage of the bill.

We have cut off these messages so that now no bill can be passed at all until it has been in print, on the desks of the members of both houses, for three full days in its final form.

So we have taken away the temptation to rush things through in the rather discreditable hurly-burly of the closing days of the session — things that nobody knew anything about and that would not stand having anybody know anything about them.

And then we have required that the debates of the legislature shall be printed from day to day just as the debates in Congress are, and the debates in the British House of Commons are, and the debates in the French Chamber are; so that in the first place, the people of the state will know what the men at Albany are doing, and why they are doing it, and so that the legislature of our state will be an opportunity for an able young man to help himself along in a career. Who knows now,— who knows now why things are done at Albany ? Here and there, a newspaper prints something that is said, but the necessities of news service require the striking and the spectacular to be reported, and the dull and uninteresting, real debates, are never known; and as a result, the art of debate has gradually been declining in Albany. Now a young man, if this constitution is adopted,

can go to Albany, and if he has anything in him, he can get credit for it, and service in the legislature will be a stepping-stone to preferment in a public career.

And we have taken away the temptation to trade in offices, the temptation to bind the governor of the state to all sorts of bargains by doing away with the requirement that all of his appointments be confirmed by the state senate. We have taken away the temptation to pass "ripper" bills by putting into the constitution a fixed statement as to the heads of the great departments of the state, so that they cannot be made the football of selfish politics, but must remain the great agencies of true and patriotic politics. We have made it possible for the legislature of our state to retrieve the good name of the state legislatures of our country; we have made it possible for the executive of our state to make true the declaration so long standing in our constitution that the executive power is vested in the governor, and to perform the duty so long required of the governor to take care that the laws are executed.

We have made it possible that our courts, which wish to do justice, and will do justice if they are permitted, shall give an honest man his rights as against all shysters whatsoever.

And that is all one comprehensive scheme. You cannot submit it section by section; it is a complete inter-related, thought-out whole, for the redemption of the government of our state from the ill-repute into which it has fallen, for doing away with the selfish playing of politics in the place of government; for the reduction of the extravagance and lavishness and lack of responsibility that has brought our expenditures up from twelve millions at the time of the last convention, to forty-two millions a year at the time of this convention; that has brought our debt up from seven millions to one hundred and eighty-six millions; that has made

our highways and our canals and public works generally the vehicles for graft and robbery of the public.

Now, we may be wrong about some things, but, we are not wrong about the need. No one will challenge the need for an improvement in the government of our state. These men who worked all the five months of the spring and summer, may not have found the true solution; but it is an extraordinary circumstance that after long study and discussion and full and open debate, they came, after all the wide differences of opinion, to an amazing agreement. Twelve of the measures of the convention were adopted by unanimous vote. Twelve by a vote of more than ten to one, and the remaining nine by votes of more than seven to one, more than four to one, more than three to one, and but three measures by votes of only two to one. And I will undertake to say that the conclusions upon these grave and serious matters, the reform of the machinery of our state government, reached by these men, selected from among our people after their long study and discussion, with such unanimity, cannot be justly challenged upon five minutes' consideration. We may have been wrong, but the reasons thus far alleged for voting against the constitution, compared with the weight and seriousness of the matter which the constitution carries, and the great results which it seeks to accomplish, are trifling, unworthy of consideration, bear the marks of but little consideration, and seem rather to be a means of excusing an opposition which finds its real origin and cause in something besides the reasons suggested.

Now, gentlemen, the convention had a majority of two-thirds of Republicans in round numbers, two-thirds Republicans, and one-third Democrats. The Republican majority of the convention, after much discussion and some feeling, reached the conclusion that it could serve its party best by serving its state best, and invited the coöperation, welcomed

the assistance of the Democratic minority. We put into that constitution the affirmative constructive program adopted by the Republican party of the state by the mass meeting held in this city on December 5, 1913, at which nearly one thousand Republicans from all over the state were present. We put into it the constructive program which was approved by the Republican convention at Saratoga, in 1914. We put into it also the agreement of the Democratic party upon many of the great measures of constructive statesmanship for which the Republican party had declared, and upon all the great measures of the convention: upon the home rule measures; upon the judiciary article; upon the reorganization of the executive department, commonly spoken of as the short ballot bill; upon the budget reform. Upon all the five, the six, great measures which make the body of that revised constitution, there was a vote not only of a majority of the Republicans, but a majority of the Democrats of the convention. Now, how can Republicans fail to vote for it ? It is their work. It is their program. It is giving effect to their declarations. How can Democrats fail to vote for it ? For their best, their best whom they sent to the convention assented to it; agreed to it; put their thought and effort into it. So many of the eminent, respected, honored Democrats of the state are for it; but I regret to say that there are some men who are so unwilling to see the constitution adopted which was the work of a convention having a Republican majority, that they are seeking to do what the constitutional convention refused to do; they are seeking to play politics with the constitution. We thought it was our duty to rise above partisan play of politics and to serve our state; to show that our party sought to gain only by serving the state, and so it was with the great majority of the Democrats in the convention; but these men, these men are seeking to defeat this constitution, in order that they may reverse the judgment of 1914 which

put Republicans in control of the convention, hoping that they may have another convention in 1917 or 1918, that they will control.

Great as is the issue of the constitution, almost as great is the question whether the people of the state of New York can be controlled by that low and unpatriotic view of public duty. If they succeed, who will write the constitution in 1918? What will be in it? All these schemes of reform of our government will have been discredited. Not these things; oh, no, the people would have voted against them. What will be in it? Dare you think of it? Mr. Gompers is against the constitution. He was defeated in 1914. If he succeeds, and there is another convention, and he is elected, he will perhaps write the constitution. I can name a lot of others who think that they will write the constitution if they can defeat this one; but it will have none of this plan of reform, for that will have been defeated by the people. . . .

I am told that the great danger to this constitution lies in the possibility that men may not vote upon it at all. Of course it is very difficult to vote upon a complicated matter which took the convention five months to work out, upon such consideration as can be given to it by the ordinary business man, by the farmer or the storekeeper, or, indeed, by any one whose time is occupied in his own affairs. But if we are ever to have a reform of our state which conforms to the necessities of economy and efficiency and the preservation of liberty and order, if we are to keep pace with the learning of our time, as to the methods of transacting business, if we are to make the affairs of government as well administered as the affairs of the great business corporations, the people of the state must take interest enough in such a question as this, either to study it and form their own opinions upon it, or to give the benefit of the presumption

to the men whom they elected to work out the problems and to find remedies. And I invoke from you, my friends, earnest and sincere effort to bring to the people of our city and our state an appreciation of the importance of the subject which is before them, and the importance of their acting upon it, and acting upon it wisely. The Republican Club never had a duty more serious and more clear; and if you will perform that duty in the spirit of your past, you will add new lustre to your history and gain new credit as patriots and make me, at least, your long-time friend and loyal associate, more proud than ever of being a member of the Republican Club of the City of New York.

THE NEW YORK CONSTITUTION AND REPRESENTATIVE GOVERNMENT

ADDRESS BEFORE THE ECONOMIC CLUB OF NEW YORK
OCTOBER 25, 1915

At its thirty-third meeting at the Hotel Astor, on October 25, Mr. Root was the guest of honor of the Economic Club of New York. Mr. William E. Wilcox, the chairman of the meeting, in introducing Mr. Root as the presiding officer of the recent convention to revise the constitution of the state of New York, said:

> We are glad indeed to welcome here the distinguished gentleman who has rendered such lasting service to the country in the important offices he has held. To no man in our generation is the country under a greater debt of gratitude for the unselfish devotion he has shown to the state and to the nation, than to our distinguished guest.

WHEN the constitutional convention, the result of whose labor is before you for your action as electors of the state of New York, assembled in Albany in April last, they found themselves holding a warrant of but weak potentiality, as comparatively few of the people of the state had voted for a convention. A very small majority of those who voted had cast their votes in the affirmative. Yet there was a duty imposed upon the members of the convention; and upon a survey of the field it seemed to them that there was something to be done; not merely the amendment here and there of specific provisions of the constitution of the state; not mending and patching in detail the provisions relating to the different departments of the state government, but of wide and serious importance.

We all knew, and the members of the convention felt, that throughout the American Union there was dissatisfaction with the workings of state government. In a large part of the states of the Union that dissatisfaction had found expression in a partial abandonment of the system of representative government. In a great many of the states the

people had turned from the attempt to establish by their votes from year to year satisfactory state governments, which through the workings of their legislative, executive, and judicial branches, should do the popular will, maintain order, secure justice, and preserve liberty, and had sought to substitute other methods of attaining their purposes: the initiative, the compulsory referendum, the more sudden and instant control over administrative and other judicial officers through the recall, — direct legislation as distinguished from representative legislation. Some of us who felt that representative government was the greatest gift of our race to the development of freedom, some of us who had been standing for years in opposition to the abandonment of representative government, felt that in that convention the duty pressing upon us was to show, if we could, that instead of abandoning representative government because of its defects and the evils which accompanied its exercise, we should seek to cure the evils by improving representative government, and bringing it back to the exercise of its full power and the performance of its great function; and the effort to give to the people of the state of New York an improvement of representative government which should be an answer to all those who were preaching the abandonment of representative government, is the keynote of the work of the convention; is the reason and the rationale of the constitution which is before you now for action.

Of course, if legislation is to be direct, if the laws of the state or nation are to be made at the polls upon the initiative of any group of men who have ideas that they wish to propose, the dignity and the power of representative assemblies must decline. Of course, if that system of government is to prevail, the American system of government through representative assemblies must grow weaker and weaker; and if that system is not to prevail, representative assemblies must

be made to do their work, to meet the well executed purpose and the will of the people whom they represent. It is that feature of the work of the convention which should, I think, appeal to this Economic Club; for you deal not merely with details, but with the philosophy of government, and with the broad, underlying principles which are to be applied. And I put to you, as the first great ground upon which the work of this convention is to be favorably regarded, that it is an effort, sincere and serious on the part of the one hundred and sixty-eight men elected by the people to do the work, to reinstate the representative government of our fathers in the position to which it is entitled, and to make it so good, so sound, so effective a government, that all demand for the abandoning of representative government and the substitution of direct legislation will pass away, and be repudiated.

Now, we found certain manifest defects in our government. They were not peculiar to the government of the state of New York. They are to be found throughout the Union, in the government of most, if not all, of the states. Although there was no great majority of the people calling for a constitution, the members of the convention deemed it their duty to deal with these defects.

Let me try, in the brief time I have, to state in outline what they were. In the first place, we found that under our judicial system the course of justice had come to be obstructed; it is slow and expensive and uncertain. It takes years for an honest man going into court to assert a right, or redress a wrong, to reach his conclusion. He finds himself obstructed, frustrated in the progress of his suit. If he reaches a favorable result, he finds himself sent back on appeal, and he is obliged to begin over again. Whenever the administration of justice is entrusted to a class and guild, the tendency always is to make it a mystery, to have it become more refined, and subtle, and technical; and as you

understand the course of development of judicial procedure, you perceive that from time to time it has been necessary for the people, who want only simple justice, to step in and bring back the administration of their courts to their own simple basis.

In 1846 the constitutional convention, tired of the technicality and subtlety of the common-law procedure, required that the procedure should be simplified, and from their requirement came the code of 1849, which, in a simple way, with three hundred and odd sections, introduced a simple procedure that went all over the country as the reform procedure, and which was followed in England — conservative old England — in 1873, by their Adjudicature Act. But now we have been going backwards in this state, and year by year the legislature, whose action was substituted for the old common law, has been adding to the code of procedure, piling up amendment after amendment with specific and particular rules, until we have a code of over three thousand sections, and until every act in a court of justice is regulated by detailed and meticulous statutory provisions; so that when a plain man goes into court, he has to meet at the hands of an acute and ingenious adversary the necessity of litigating upon a great variety of rules which, because they are imposed by the legislature, constitute statutory rights.

He may be right in his claim for justice, and he may be wrong in his practice. Each of these rules is good enough, but all taken together result in a man's finding himself tangled in the form, denied his rights, compelled to litigate until his means are exhausted, so that it is hardly worth his while to go into court. And again, as was done in 1846, as was done in England in 1873, again we need to bring our judicial procedure back to the simple basis of a plain, honest citizen's intelligence.

We have got our procedure regulated according to the trained, refined, subtle, ingenious intellect of the best practiced lawyers, and it is all wrong. Our procedure ought to be based upon the common intelligence of the farmer, the merchant, and the laborer. And there is no reason why it should not be. I say it not without experience in legal procedure. There is no reason why a plain, honest man should not be permitted to go into court and tell his story and have the judge before whom he comes permitted to do justice in that particular case, unhampered by a great variety of statutory rules. And in this convention, acting upon the teaching of the great experience of its members, and following the philosophy of the history of the development of the law, we undertook by plain and adequate provisions to compel the restoration of our judicial procedure to that plain basis of honesty and opportunity.

We found that there had been a vast increase of the expenditures of the state, as well as of the indebtedness of the state; expenditures which had increased from twelve million dollars a year for a number of years after the last convention, to forty-two million dollars a year in the last year. Debts amounting from seven million dollars upwards to one hundred and eighty-six million dollars, amounting to a mortgage for the state and municipal debts, excluding the debt of New York City, of over thirty dollars an acre of the lands of the state, vastly outstripping the increasing population and vastly outstripping the increase in wealth. We found a general belief, clearly with some foundation, that much of the money raised by this enormous increase of debt, had been expended without due return to the people of the state.

Successive administrations of the same party, — administrations of different parties, — all had contributed their part toward this increase of debt; and we looked into the system

to see why it was — why it was impossible to stop the race of extravagance; and we found that the state government had been built up from simpler times by accretion. As a new thing seemed desirable, it was added by legislation. A new board, a new bureau, a new officer was created to do this, or that, or the other thing which seemed desirable, until there were one hundred and fifty-two different state boards, commissions, and agencies, all of them engaged in the business of the state. All of them were practically without supervision, each one going its own way, and all of them were getting all the money they could to spend; not subject to inspection or supervision, or that limiting power which comes from the knowledge that what they do is going to be subject to supervision and criticism; and it was perfectly plain that the business, the great business of this public corporation, was being carried on in a way that would bankrupt any private industry. No one of our great industrial institutions, our great transportation companies, could live for a year doing its business in the way that the business of the state is being done. No public officer can afford to be without the feeling that his work is going to be inspected and criticised. No body, corporate or politic, any more than a body money-making and industrial, can afford to have its agents free, and with knowledge that they are not going to be inspected and supervised and held to accountability; and so it seemed perfectly plain to us that we must apply, in all the executive and administrative branches of the state government, the rule of adding power to responsibility, and responsibility to power; that we must have a government every agent of which was accountable to somebody above it, until you get up to the executive head of the state, who himself is accountable to the people at the polls. And we endeavored to bring that about by requiring the legislature to put all these one hundred and fifty loose-lying agencies into seventeen desig-

nated departments, each agency to be accountable to the head of a department, and each head of a department, with the exception of two, to be accountable to the governor.

And that is the Executive Reorganization bill of the convention, commonly spoken of as the Short Ballot bill, although the short ballot feature of the bill was but an incident to this great work of putting the executive and administrative business of the state upon a sound business basis of accountability and responsibility, and responsiveness to the public will, and power to execute the public will.

And then, turning to the legislative branch, we found our legislature like the legislatures of most of the American states, in disrepute. Ah, is it not so, my friends? Can any one of us be proud of the esteem in which the great legislative branch of our government is held in this state? Ought we to submit to have a legislature which is commented upon, and weighed, and measured as our legislature is in the public press of the state? Can representative government be a success unless that is stopped? Is there not vital need, if our institutions are to continue, if our representative government is to live, that our legislature shall be raised above the low esteem in which the public holds it, and has held it for years past? Well, the convention tried to accomplish that by a series of provisions based upon an estimate of the causes for the low esteem in which the legislature was held, and in examining the causes.

We found this to be the case: as government has become more complicated, the legislature has been overwhelmed with a vast mass of detail. Now, development of all business concerns, of all government, is that as affairs grow complicated, more and more has to be delegated by the chief to subordinates. And the true method of development is that the chief shall delegate matters of minor importance to subordinates, and himself retain and act upon the matters of

major importance. That is as true of legislation as it is of administration. But we found that in the legislature the matters of minor detail were retained, and the matters of major importance were receiving scant attention.

The members of the legislature have been going to Albany, each one with his local bill, his private bill, his special bill for some interest in his district, upon the success of which has often depended his reëlection; and the legislature is overwhelmed with a mass of detail, local legislation which ought never to be there at all, and the result of this has been that the legislature has not been adequately discharging its proper function.

Now, we undertook to cure that, and the first thing that we undertook to do was to state the method of dealing with the finances of the state; the method of dealing with the appropriations for the expenses of the state. We found that the legislature was making up the appropriation bills in committee, practically in the dark, suggestions coming from all quarters for what was to go into them, each member of the legislature having something he wanted to get in; and the bills were reported, run along on the calendar, and ordinarily were rushed through in the closing days of the session, with all of the turmoil and uncertainty and doubt as to what was in them, of the all-night sessions.

After the legislature adjourned, the governor had thirty days in which to apply a blue pencil to the work of the legislature and control its action by vetoing the items of the appropriation bills; and so the legislature had abdicated its true function of holding the purse strings; that had been passed over to the governor, and so the legislature was composed of men all of whom were trying to get money out of the state treasury, instead of seeking to protect the state treasury.

Now we undertook to set that right, and we turned the proceeding upside down. It had been standing on its head,

and we put it on its feet. We require, in the first place, that the heads of these new departments shall furnish to the governor in adequate time a statement of all the money required by their departments, and that the governor shall then take all these statements, put them together, revise them, prune them, and bring the amounts down to what he is willing to accept responsibility for; and that he is to lay that before the legislature early in its session, together with a statement of the revenues of the state, so that the legislature may have before it at the start a statement of the cloth from which the coat is to be cut, and of the pattern of the coat that is needed.

I undertake to say that every man who tries to keep a cash account finds that it makes him economical. When you sit down and figure your revenue, and put down in another column your necessary expenses, and then see what you have for new things, for optional things, for things you would like, the necessity of condensing your expenditures to meet your revenues makes you economical; and for the first time in the history of our representative government, this constitution requires that process with the finances of the state. For the first time, under that provision, the legislature of the state of New York, having the demands of the executive put before it, and the statement of the revenues out of which those demands are to be met, will be performing its true, traditional function as a representative body, in holding the purse strings, and protecting the purses of the people. Now, you see, that cuts out all these vast assaults upon the treasury by individual members of the legislature, so that they are relieved from the temptation to attend to these local matters instead of attending to the greater interests of the state.

Then we put in a provision prohibiting the passage of bills by the legislature for the expenditure of state money upon local improvements, the building of bridges, culverts,

embankments, dredges, roads, etc., in localities, prohibiting the spending of any money of the state treasury for these purposes, unless there was a plan, and an estimate, and a certificate from the superintendent of the public works as to whether the interests of the state required that the work should be done at the expense of the state. So that now, if the constituents of an assemblyman want him, as a condition of their support, to get a bill for the building of a bridge over a creek in such or such a town in his district, he must refer them to the superintendent of public works. And then we relieved the legislature from other vast accumulations of private and local bills by proposing the home rule provision for cities, which gives to the cities of the state as large a measure of control over their own affairs as it is wise and reasonable to give them in one step. We vested in the local legislatures the exclusive power to pass laws for the regulation and control of the property, local affairs, and government of their municipalities; and so the great flood of local city bills, which occupy the time of the members of the legislature, are cut off and put where they belong — in the municipalities themselves.

By another provision, we accomplished practically the same thing as Congress, by providing that the legislature shall pass no law relating to a county, except upon a request of the local authorities of the county. By this provision we have cut off from the legislature the great flood of code amendments coming up, most of them from local sources and proposed for local reasons, for particular litigations. Then we put in a provision prohibiting the passing of laws authorizing the audit of claims against the state, laws which always show favoritism; leaving claims against the state to the equal justice of general laws.

And so we have relieved the legislature from the temptation and preoccupation of these local bills, and we have left

them nothing to do but attend to the public business. Further than that, we have undertaken to dignify the legislature. We have undertaken to recognize and compel recognition of the true and high function of the legislative assembly of the state of New York. We have provided that when the appropriation bills come before them with the demands of the executive department for the expenditure of the moneys of the state, they shall have at their hand the commissioner of accounts, the head of the department of accounts, who shall be required to make such examinations for them, and such reports to them, as they shall require, regarding the necessity of these expenditures.

We have provided that they shall have a right to call before them the governor and the heads of departments, and inquire from them what they want the money for, why they want the money, and why they cannot do with less.

We have cut off the emergency message under which the governor could call upon the legislature to pass bills before they are printed, so that no bill can now be passed by our legislature without having been in print in its final form on the desks of the members of both houses, for at least three days, and all of the unseemly acts of the concluding days of the sessions will be over.

And then we have required that the debates of the legislature shall be printed and published from day to day, just as the debates in Congress are published, the debates of the British House of Commons, and the debates of the French Chamber, so that members of the legislature will be required to tell why they do things, and why they refuse to do things, and the people of the state will know why they are doing things and what they are doing. These printed debates will not be light reading; they will not have a great circulation on the news stands; but they will go into every newspaper office in the state, and they will be the basis for the judgment

of the press, and they will be the basis of the editorials that are written; and the young man entering the legislature who has the ability to debate the great questions before the legislature for determination, can make his mark; and the legislature instead of being the graveyard of careers, will be an opportunity for political preferment, where ability, and energy, and ambition will enable a man to rise in political life, to show what is in him, to make service in the senate or assembly a stepping-stone to higher public duties.

There are many other things looking in the same direction, which I cannot stop to talk about. These matters are all interrelated; they are all parts of a single whole; they are all the expressions of a desire to bring back to government of the state, its true function; to raise it above the low esteem into which it has fallen; purge it of the habit of playing politics, and to make representative government again its own answer to its detractors, and its own defense against destruction.

Now, we may have been all wrong in the convention. But we were not wrong about the need for something to be done. We were not wrong about the importance to the people of this state, and the people of our country, to have something done to make representative government more effective; and that we were not wrong I can point you to a thousand evidences all over this country of the interest that has been taken in the work of this convention. It seems quite clear to me that all through the West, through the Middle West, and the Mountain West and the Pacific Coast, there has been greater interest taken in this attempt in the state of New York to restore representative government to its true estate than has been taken in the state of New York itself!

There is no mistaking the evidence of private correspondence and the publications of the press all over the

country. The people of these states seek and have been discussing the initiative, and the compulsory referendum, and the recall of the administrative officers, and of judges and judicial decisions; they see that in the state of New York we are attempting a great new departure in representative government.

We may have been wrong in the way we devised in the convention to accomplish this, but we were not wrong about the need of it; and as to whether we were wrong about the way, of course, is a question of machinery. I need not tell the members of an economic club of what vast importance the machinery of government is; how important is the question as to whether you have one metal or two for your monetary standard; how important is the question as to whether you issue small notes or not; how important are the questions that are illustrated by the difference between our old National Bank Act and our new National Reserve Act; what vast consequences come under the workings of human nature engaged in business; the conflicting and forward movement of intelligent selfishness on the part of a vast multitude of people; how important are the consequences of all that, under apparently slight differences in machinery. Just so about government. These are matters of governmental machinery. To use a familiar illustration, it is like your automobile when it goes wrong. You do not undertake to cure it by the application of general principles, you do not philosophize about it, or make speeches to it or berate it, or hit it with a club.

You ask somebody who is familiar with machinery, or is intelligent with machinery, to try to put his finger on the little thing that has gone wrong, and as he advances the spark plug, or something else, off it goes.

For five months the men who were elected by the people of the state of New York to overhaul the machinery of govern-

ment and try to make it go right where it was going wrong, labored with the subject at Albany. They heard everybody who would come; they sent for people who were supposed to know; they heard testimony for weeks and months, and then they discussed it; and they compared their ideas and they adjusted their views. They reconciled their opinions and they brought out their results, and these results are the results which these one hundred and sixty-eight men, after five months' careful study of this machinery, believe will go far to cure the evils that exist in representative government.

The question relative to this constitution is not whether some particular little thing pleases you or me. There is nobody who is wholly satisfied with the constitution. I am not. There are things in it I do not want there. There are things left out, I would like to have there. That was true for every member of the convention. But the great process of free self-government went on; the subordination of minor matters to major matters; the surrendering of individual opinion upon matters of little importance in order to secure agreement upon matters of great importance. That process by which our country is governed and by which free government must always be achieved, went on during those five months, and the result is a great attempt to accomplish something of the first order of importance for our state and country in the form of representative government in a state.

I confess that I thought when the result was reached, that the extraordinary unanimity of the convention upon these great measures, upon this great system composed of these measures, would commend itself to the people of the state. Let me read to you a memorandum which I took from the record, showing you after all the differences of opinion and the long discussion, how the members of all parties in that convention reached their conclusion. There were thirty-three amendments adopted out of over eight

hundred. Over eight hundred amendments proposed, and thirty-three adopted; therefore, seven hundred and sixty-seven men against the constitution. These thirty-three were adopted, twelve of them by a unanimous vote; twelve of them by a vote of over ten to one, making twenty-four; of the remaining nine, two were adopted by a vote of over seven to one, two by a vote of over four to one, two by a vote of over three to one, and the remaining three by a vote of over two to one. And of these two are separately submitted — they relate to taxation and apportionment — and the third was one of the minor matters of the convention; I think increase of salaries of legislators. There is another circumstance which emphasizes the extraordinary agreement which resulted from these long discussions. It is that all the great measures of the convention were adopted by a majority, not only of the Republicans, but of the Democrats of the convention.

The Executive Reorganization bill, commonly spoken of as the Short Ballot, was adopted by a vote of Republican ninety-seven to fifteen, Democrat twenty-five to fifteen, total one hundred and twenty-five to thirty, a majority of over four to one.

The budget — that great reform in the financial system of the state; that one bright hope to stop the unbridled waste of public money, which results from a vicious system — was adopted by a vote, Republican one hundred and one to two, Democrat thirty-six to two, a total of one hundred and thirty-seven to four, or more than thirty-four to one.

The City Home Rule provision was adopted by a vote, Republican one hundred and two to two, Democrat eighteen to fifteen, a total of one hundred and twenty to seventeen, or a majority of over seven to one. And let me say that the adverse votes upon that were mainly not against what it did, but as a protest that it did not go farther.

The County Home Rule provision, Republican ninety-one to nine, Democrat thirty-seven to two, total one hundred and twenty-eight to eleven, or a majority of eleven to one.

The Judiciary Article, with its provision for the reform of procedure, Republican one hundred and three to one, Democrat thirty-two to two, total one hundred and thirty-five to three, or a majority of over forty-five to one. When you remember that these two parties, Republican and Democrat, came from long experience in perennial conflict; came from far distant regions in great variety of local conditions; these results of five months of earnest and sincere consideration; these results coming from the true process of self-government certainly do indicate a probability that the provisions adopted will be, in some measure at least, a cure for the evils against which they were devised.

And it seems to me quite clear that no light consideration, no casual glance, would justify any one, any patriotic citizen of the state who wants the evils redressed, in rejecting the conclusions which were reached by that body; I mean with that unanimity, and in that way. If, upon mature considering, it seems to any man that the constitution is wrong, that the things that it seeks ought not to be done, or what it proposes in the way of remedy will be ineffective, or injurious; why, of course, he should vote against it. But, after checking these means to overhaul the machinery of government; and after doing it with this unanimity, I submit to you that no man ought to reject these conclusions, except upon full study and consideration himself, which leads him to a different conclusion.

Of course there is opposition. I have been seeking, I have been wondering much, at the causes. No such series of provisions as this can be adopted without interfering with a great many people. A good many men will be turned out of office. You cannot retrench without turning men out of

office. You cannot economize without interfering with people; and if you will look to the opposition to this constitution, in nine cases out of ten you can trace it back to the unwillingness of men to be turned out of office; the fear of men that they will be turned out of office, or the fear of men that their personal perquisites or opportunities will be interfered with.

There is one thing which I feel bound to say: The constitutional convention of 1915 rose above the plane of partisan politics. It rejected, not without struggle, not without a contest, not without strenuous exertions, the desires of some men to use the great majority of the Republican party in that convention, for partisan advantage. It deemed its duty to be to serve the parties to which each man owed allegiance, by serving the state. And that was what led to this extraordinary agreement. That was why Democrats and Republicans alike voted for these great and salutary measures; that was why, after the close of the convention, there was almost unanimous approval of its work by the men engaged in it.

It is with the deepest regret that I observe that among some people, perhaps among many of our fellow-citizens, there is an unwillingness to regard this great and important measure for the public welfare upon the same basis, love of country, and superiority to partisan advantage. All honor to Republicans and Democrats alike who united, regardless of party, to serve their state in seeking to give the people of the state a better government, and regret and sympathy for the future to those who reject that and seek to frustrate this great measure for the public good in order that there may be party advantage gained thereby.

Perhaps I am misled; perhaps I insist unduly upon the work of the convention of which I was part. If I do, you must forgive me. I beg you to do me the honor to believe

there is no personal consideration which actuates me. Since I left this city sixteen years ago last summer, to devote myself to the service of the country and the state, I have had but one client. I have had but one desire. I have but one passion: and it has been for the prosperity, and the honor, and the growth in spirit and in power of my country and my state.

I have given out all there was in me into this effort to do what I believed to be necessary for the perpetuity of our free institutions; this effort to make representative government worthy of itself. I have given out my strength, and my life to help bring that about. I hope that it will not prove to have been in vain. No, it cannot have been in vain. This constitution, I believe, will be adopted by the people of the state, but if it is not, the work of the convention will not be lost. It will be but the beginning of a process which, through the working of the processes of free government, will bring out sooner or later, in substance, all the conclusions which are right and sound; for no honest effort in behalf of one's country can ever be lost.

If it be not now that these great measures for reform are adopted, it must be after a hard experience with the evils they are designed to cure. We cannot go on with our government constituted as it is now without suffering for it. For it is bad in system, and we shall come later, if not now, through the lessons of hard experience, to realize that the measures included in this revised constitution are necessary for the well-being of the state and for the continuance of order, liberty, justice, and our free self-government.

GOVERNMENT

ACCEPTANCE OF THE NEW YORK SENATORSHIP

ADDRESS TO THE LEGISLATURE OF NEW YORK JANUARY 28, 1909

In response to a very wide desire that the state of New York should be represented in the Senate of the United States as its importance required and its traditions demanded, the Republican party of the state honored itself by requesting Mr. Root, then Secretary of State, to accept an election to that body at the hands of the Republican legislature. Upon Mr. Root's expression of a willingness to serve, if elected without any candidacy on his part, the Republican members of the legislature of New York met in caucus and unanimously chose him. Their choice was ratified by the legislature on January 19, 1909. Mr. Root accepted and qualified as senator on March 4, 1909, serving until March 4, 1915.

I HAVE to thank you and I do thank you most sincerely for the very great honor which you have conferred upon me and for the great opportunity that you have set before me — to represent in the Senate of the United States the state of my birth and of my life.

I shall do my best to justify your selection, with not too much confidence in the result, because I do not think that as a rule lawyers who have been many years at the bar and whose habits have become fixed, make very good legislators when they are not caught young, and I have a rather uncomfortable sense that it will be quite impossible for me to live up to the many kindly and delightful things that have been said about me by my friends in the state of New York during the past few months.

I have come to Albany in the hope of meeting the men who are leaders of opinion and of political action in the state of New York and who are, as they ought to be, in the two houses which legislate for the state.

It is my strong desire to get into touch with you as the representatives of the people in the state legislature. I have

been for the greater part of the past ten years in Washington, engrossed in the affairs of the national Government which have lain outside even of the limits of the United States, and I feel that I am a little out of touch with the current affairs of the state.

I should like to get back into the same knowledge and familiarity with them that I had years ago when I was here within the state all the time. And I should be glad to establish such a personal relation of acquaintance with every member of the senate and the assembly that if you have anything to say to me as your Senator in Congress you will feel at liberty to do so and that if I have anything to say to you I shall feel at liberty to say it.

I mean this not merely with regard to the filling of offices, although every Senator of the United States is charged with the duty of representing his state in regard to appointments to Federal office from that state and in that state. He is a part of the appointing power, and it is his duty to see that as far as the exercise of his office, in vote and in advice, is concerned, his state has the benefit of its citizens' knowledge of character and reputation in their own communities, so that if a man has lived a good and useful and active life, is respected by his neighbors, is esteemed by them worthy of honor and capable of performing useful public service, this may be made known to the President in Washington through the voice of his representative in the Senate of the United States.

But I mean more than that. Our Government is becoming complicated in a very high degree. Difficult questions are continually presented which affect the interests of every state; and the wide and immense and varied interests of the state of New York are particularly liable to be affected by a great variety of measures which come before the national Congress. I would be glad to have you express

your opinions upon all measures which appear to you to affect the interests of the state.

I shall be glad to be at liberty to consult you freely, as occasion offers, upon the practical operation of measures pending before the national Congress.

If you think it will be beneficial to the state of New York, for example, as I now think it would be, to have a parcels post provision included in our postal laws, so that the 39,000 rural free delivery carriers instead of driving around the country with empty buggies, as they do now, shall earn enough to pay their salary by carrying small packages to the people they serve — if you think that would be beneficial to the interests of the state of New York, I shall be glad to have you say so, and if you think I am wrong in that I should be glad to have you say it.

There is more to be considered, however, than the mere interest of the state of New York, in the relation which exists between you and your Senators in Congress. The different states of the Union are no longer isolated communities. They are welded together in their interests, business and social, and the action of every one is felt upon every other. The interests of every one are bound up in the prosperity and the welfare of every other.

With the great and complicated problems which are pressing upon our national Government, it is becoming every year more apparent that the people of no state can live to themselves alone, and that they have set before them as the highest of duties, the obligation to contribute their share to the solving of the great national problems for the maintenance and furtherance of that common interest which is vital to the people of every state but confined by the limits of no state.

Upon these great questions I ask your help in the performance of those duties which you have imposed upon me.

The intimate connection between the people of every locality and of every other state, largely brought about by the increase of communication, the passing to and fro of the trains upon our great railroads, the telegraph and the telephone, the extension of business which knows no state lines, and the substitution of great national centers of business for the old state centers of business, the development of commercial and manufacturing and social life along national lines, has forced upon the national Government the performance of a great variety of duties which formerly were performed by the states within the limits of their comparatively isolated communities.

By the exercise of the powers granted in the interstate commerce clause of the Constitution, the national Government is extending its power over the operation of our railroads, our steamship lines, our telegraph, our express companies. By the exercise of the taxing power it is regulating the action of the people all over the country, as for instance in the Oleomargarine Act. By the exercise still again of the commerce power it is controlling the adulteration of food and deceptive practices in the sale of food, as in the Pure Food law.

The activities of the general Government are continually widening, step by step, covering ground formerly occupied by state action.

That is not a matter of what we wish or what we do not wish; it is not a matter of political program or platform; it is plain fact to be seen by any one and a fact to be considered.

There is one advantage, a great advantage, which has come from it, is coming from it; that is, that we are acquiring effective control over the great developments of business activity in our country in many directions to a degree which could not be possible by state action; that we have

growing a strong, virile, competent and effective national Government; that we have built up a great national power respected and honored throughout the world; that America is a name for pride and satisfaction; that from all external attack this powerful national Government protects, and effectively protects, our homes, our families and our lives.

But there are two dangers coming with this same development. One is the danger that the national Government will break down in its machinery through the burden which threatens to be cast upon it. This country is too large, its people are too numerous, its interests are too varied and its activity too great for one central government at Washington to carry the burden of governing all of the country in its local concerns, doing justice to the rights of the individual in every section, because that justice can be done only through intelligent information and consideration.

And the mass of business that is now pressing upon the legislative and executive and judicial branches of our Government in Washington seems to have come about to the limit of their capacity for the transaction of governmental business.

The other danger is the danger of breaking down the local self-government of the states. After all, the thing that we have government for is ultimately the preservation of our homes and our individual liberty. And we ought to be at liberty to regulate the affairs of our homes in accordance with our own ideas.

The tendency to vest all powers in the central government at Washington is likely to produce the decadence of the powers of the states. Now, do not misunderstand me. I am a convinced and uncompromising nationalist of the school of Alexander Hamilton. I believe in the exercise of the executive, the legislative and the judicial powers of the national Government to the full limit of the constitutional grants,

as those grants were construed by John Marshall, and would be construed by him today.

But I believe that the founders of the Republic builded more wisely than they knew, when they set the limits between the exercise of that national power and the exercise of the local powers of the states. And while I believe in the exercise of the national power throughout the province of the constitutional grants of national power, I believe also in the preservation of state power within the limits of its constitutional authority.

Further than that, I believe that the essential quality of free government is to be found in the observance by all public officers of the limitations set by law upon their powers. Once admit the right of public officers to disregard limitations upon their powers and you are launched on the course by which good men come to be benevolent despots, with the inevitable corollary that bad men have the opportunity to become tyrannical dictators.

Evidently, if the powers of the states are to be preserved and their authority is to be continued, the states must exercise their powers. The only way to maintain the powers of government is to govern.

Let me say that the men who make the most noise about state rights are very apt to be the men who are the most willing and the most desirous to have the national Government step in and usurp the functions of a state when there is an appropriation carried with the usurpation.

The men who are found opposing the maintenance of the authority of the treaty provisions of the United States made under the express grant of power in the Constitution are apt to be the very men who are anxious to have the Government come into their states and spend no end of money in doing the things that the states ought to do themselves in the exercise of their powers. But the invitation to

the national Government to assume this and that duty within the limits of a state is an invitation to set up national power to the ultimate exclusion of state power.

Because I believe in maintaining the two grants of power of the Constitution, maintaining the national power to its full limit and still preserving the state power, I am opposed to everything that tends to belittle, to discredit or to weaken the authority of the legislature of the state.

You cannot take power away from public bodies without having the character of those bodies deteriorate. For this reason I am opposed to the direct election of Senators, as I am opposed to the initiative and referendum, because these things are based upon the idea that the people cannot elect legislatures whom they trust.

They proceed upon the idea of abandoning the attempt to elect trustworthy and competent state legislatures. But if you abandon that attempt, if you begin to legislate or to amend constitutions upon that theory, what becomes of all the other vast powers of the state legislatures, in maintaining the system of local self-government under the Constitution ?

If the people of any state are not satisfied to trust their legislature to discharge the constitutional duty of electing senators, let them cure their own faults and elect a legislature that they can trust. Ultimately, in the last analysis, we must come down for successful government to the due performance of the citizens' duty at the polls, and there is no reason to believe that the citizens would perform their duty in the direct election of senators, or in voting upon the initiative or the referendum, any better than they perform it in the election of members of the senates and the assemblies of the states. I am opposed to all steps that proceed upon the theory that the people of our states are to abandon the duty of making their state legislatures able and honored bodies

competent to perform the great duties of legislation for those great commonwealths.

Let me say another word which directly bears upon the relations between the performance of your duties and the performance of duties in the body to which you have sent me. The intimate relations between the people who live on one side and the other of different state lines, and the increasing interdependence of people upon each other in wide communities that are not determined by state lines, have created a situation where, in the exercise of a great many of the powers that are reserved in the Constitution to the states, regard ought to be had, not merely to the direct interests of the people within the limits of the states, but also to the claims of neighborhood, the comity that should exist between different communities, the necessity for adjustment of relative rights and interests.

In other words, there is occasion to consider the relations of different states or different communities in different states in the exercise of your powers as well as in the exercise of the national powers.

Take for example the question about the pollution of the harbor of New York, with New York on one side and New Jersey on the other. It is not a subject I have studied, but it is a subject which I observe is up for consideration. I believe suit has been brought by the Attorney-General of the United States regarding it. The states of New York and New Jersey ought to agree upon a reasonable and just solution of the subject without any lawsuit from the Attorney-General of the United States.

There are coming up continually questions in which the legislation of one state will vitally affect the interests of another. Upon those questions it ought not to be necessary for people to press the national Government to come in and usurp the functions of the state in order to have uniformity

of treatment on the subject. The states themselves ought to concur, consult, exercise consideration and good neighborhood toward each other in the performance of state functions in matters which affect other states.

The Constitution contemplates such situations, for it provides that states may make agreements with each other by the consent of Congress. It is not necessary that Congress shall stretch and strain its authority, but just in so far as the states neglect to perform their duties in such matters, just so far they invite the pressure upon Congress to lead it to attempt to remedy the evils by stretching the national authority.

We have much to learn. We have much to do. The growing complications and many problems continually presenting themselves and taxing the best thought of the most experienced public servants; the problems of the future, the solutions of which are still undiscovered; the other problems certain to rise that we have not yet discerned — all these are making it more and more vital to the interests of every home in every state that the public servants of the state and the nation shall coöperate in the performance of the functions of government with a spirit of good citizenship, of patriotism and of loyalty to the Constitution under which we live.

To that coöperation jointly with you I pledge myself for the next six years, if I live so long.

THE DIRECT ELECTION OF UNITED STATES SENATORS

ADDRESS IN THE SENATE OF THE UNITED STATES FEBRUARY 10, 1911

A joint resolution was introduced in the Sixty-first Congress (S. J. Res. 134) to amend the fourth paragraph of Section 2, and the first paragraph of Sections 3 and 4 of Article I of the Constitution of the United States. These paragraphs read as follows:

> Section 2. When vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies.
>
> Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.
>
> Section 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators.

The joint resolution before the Senate, with the proposed changes in the Constitution indicated in italics, was as follows:

> The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* for six years; and each Senator shall have one vote. *The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.*
>
> The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof. [Omits the words: "*but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.*"]
>
> When vacancies happen in the representation *of* any State *in the Senate*, the executive authority *of such State* shall issue writs of election to fill such vacancies: *Provided, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.*
>
> *This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.*

The provision to amend Section 4 of Article I to which Mr. Root earnestly objected in his address of February 10, 1911, was rejected by the Senate before the resolution as a whole was voted upon. On February 28, 1911, the joint resolution, as amended, was put to vote and it failed to pass, two-thirds not having voted therefor, the vote being: yeas, 54; nays, 33.

In the Sixty-second Congress, the joint resolution to amend Article I of the Constitution was again introduced (H. J. Res. 39) and passed the House containing the proposed amendment to Section 4 of Article I. In the Senate, Senator Bristow, of Kansas, offered an amendment to the joint resolution which consisted of the

omission of the proposed amendment to Section 4 of Article I. Senator Bristow's amendment was adopted and the joint resolution as thus amended, passed the Senate June 12, 1911. The House disagreed to the Senate amendment, and a conference committee was appointed. The conference disagreed, and the Senate insisted upon its amendment. Nearly a year later, on May 13, 1912, the House receded from its disagreement to the Senate amendment, and the joint resolution was then passed without the proposed amendment to Section 4 of Article I. The joint resolution was certified to the Department of State, May 15, 1912, and transmitted to the several state legislatures for action thereon. On May 31, 1913, the Secretary of State, by proclamation, announced that three-fourths of the states (actually 36) having ratified the amendment, it had become valid as the Seventeenth Amendment to the Constitution of the United States.

Mr. Root spoke as follows:

THE joint resolution now before the Senate contains two separate and distinct amendments of the Constitution of the United States. The first amendment proposed is to change the third section of the first article relating to the election of Senators, so that it shall provide for the election of Senators by the people of the several states instead of their election by the legislatures of the states. That is accompanied by an appropriate provision regarding the filling of vacancies which may occur at such time that they cannot conveniently be immediately filled by an election.

The other amendment proposed by the joint resolution is to strike from the fourth section of the first article the provision that —

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

And to substitute therefor a provision that —

> The times, places, and manner of holding elections for Senators shall be as prescribed in each state by the legislature thereof.

That involves two changes in the existing provision. One is to abolish the peremptory command of the Constitution directed to the legislatures of the states, requiring them, as a matter of their duty under the Constitution, to prescribe the times, places, and manner of holding elections for Senators,

and to substitute for that peremptory command for the performance of a duty under the Constitution a reference to action which the states may or may not take under their own authority. That change is accomplished by inserting the word " as " in the new provisions. I hope I make it clear.

The present section 4 of the first article of the Constitution provides that —

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof.

That is the command of the nation by the sovereign authority of the Constitution to the legislature of each state, requiring it to prescribe the time, places, and manner of electing Senators; and when they act they act in the execution of a mandate from the nation embodied in the national Constitution. Now read the proposed substitute:

> The times, places, and manner of holding elections for Senators shall be as prescribed in each state by the legislature thereof.

If a state prescribes, well and good. It does it under its own authority. If a state does not prescribe, well and good. There is no mandate of the Constitution of the United States requiring the state to do it. It is a clear, distinct, and unquestionable abandonment of the requirement of the Constitution for this fundamental and essential act under national authority for the preservation of the national life.

The second change in the fourth section of the first article of the Constitution is made by omitting from that section all authority in Congress to make or alter the regulations which are prescribed. The present section reads:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The proposed substitute for the fourth section reads:

> The times, places, and manner of holding elections for Senators shall be as prescribed in each state by the legislature thereof.

All vestige of national authority as the source of power to perform the act and of national control over the performance of it, or of national power to modify or supplement or compel conformity to national interests, disappears from the provision which is recommended to the Senate in the joint resolution now before us.

Mr. President, I am opposed to both of these amendments. I am opposed to changing the election of Senators from the legislatures to the people at the polls, and I am opposed to abandoning the authority of the National Government over the election and the constitution of the members of this branch of the Government.

Let me first state the reasons why I am opposed to the change in the manner of electing Senators.

It is not wise that the people of the United States should contract the habit of amending the Constitution. Stability in our Government is a matter of vital concern. When America set forth in her great experiment, the almost universal opinion of the world was that she would speedily encounter the disasters that all attempts at popular government had met before that day. The world knew well that the tendency of democratic government was toward frequent change; it knew well that, while all forms of government have weaknesses peculiar to themselves, the weakness of democratic government was its liability to change with the impulse and enthusiasm of the moment, and, through continual changes, to vary from extreme democracy, which men called ochlocracy, on the one hand, to oligarchy and dictatorship on the other. And since the time when our fathers framed the Constitution, half a score of nations, seeking to follow the lines of our experiment, have, in varying degree, and some of them to the last degree of failure, justified such an apprehension.

But with us, Mr. President, there has been one great anchor. In our Constitution we have embodied the eternal

principles of justice; we have set up a barrier against ourselves. As Ulysses required his followers to bind him to the mast that he might not yield to the song of the siren as he sailed by, so the American democracy has bound itself to the great rules of right conduct, which are essential to the protection of liberty and justice and property and order, and made it practically impossible that the impulse, the prejudice, the excitement, the frenzy of the moment shall carry our democracy into those excesses which have wrecked all our prototypes in history.

Mr. President, reverence for that great instrument, the belief of mankind in its perpetuity, the unwillingness of our people to tamper with it or to change it, the sentiments that are gathered around it — these, constituting the basis of stability in our Government, are the most valuable of all the possessions of the nation that inhabits this rich and fertile land. Because the American people stand by their Constitution and are unwilling to yield to suggestions that it be tampered with and altered upon slight provocation, every acre of farm-land, every farm-house and barn, every stock of goods, and every manufactory in the country are of greater value. No change in our Constitution should be permitted to cast a doubt upon its permanency and inviolability, unless there be the weightiest and most commanding reasons. All presumptions are against it. The great public policy of a century is against it. A heavy burden rests upon those who wish to make the change.

This is especially true, Mr. President, when a change is proposed which in any degree alters the delicate relations which exist between the national and the state governments, or which in any degree affects or modifies any of those great compromises of the Constitution which enabled the thirteen original colonies, different in interests, in traditions, in size, in population, and in industries, to adjust their different views and to enter into a binding agreement.

Whenever a proposal is made to change the provisions that affect the relations between the states and the National Government, or to modify any of the terms of one of those great compromises upon which the institution rests, there are special reasons for rejecting it, and a double burden rests upon those who propose it. For more than one hundred years the provisions of this instrument as they are, with every sentence weighed, with every word scanned and receiving its full meaning, have been considered and clarified and determined upon by the courts. Our people have become accustomed to statutes based upon these provisions as they are. A great war has been fought to settle the most vital and important of the questions arising under this instrument as it is. The different parts have become adjusted to each other. We have come to understand what their relation is. The ship has found itself and we are free, after a century of discussion, from serious questions as to the relations of the general and state governments.

How the field of discussion has changed! Look at the old records of Congress, and you will find them filled with animated and excited controversies which have passed away. And now I say that for us to launch into a new era of changed provisions and new questions arising from them, would be justified only by the most serious and weighty reasons. Changes by amendment may seem to gentlemen who propose them simple, and their effect may seem to be unquestionable. But, Mr. President, no one can foresee the far-reaching effect of changing the language of the Constitution in any manner which affects the relations of the states to the general government. How little we know what any amendment would produce!

One hundred and seven years ago we made an amendment relating to the election of the President and Vice-President. Has that amendment produced the result which its authors

expected? No; far from it. The results of action under that amendment are as different from those which were expected by its authors as our Government is different from the government of any Oriental power.

Forty-five years ago we made a series of amendments, following upon the great Civil War. Have those amendments worked out as their authors expected? No. No man can open to the fourteenth and fifteenth amendments of the Constitution, and for a moment maintain that they have accomplished what the Congress of the United States expected them to accomplish when it passed the resolutions for their submission, or what the state legislatures expected when they approved them.

We enter upon a field of doubt, of new discussions, the end of which no man can foresee, when we begin to tamper with the delicately adjusted machinery to which we have been so long accustomed and which we now understand so well.

Mr. President, there has been but little attempt here to assign reasons for the proposed change in the election of Senators. It has been left in the main to rest upon the proposition that the people of the country desire it; that there have been resolutions adopted by many legislatures; that planks have been put in many political platforms; and that as a whole the people of the country wish for the change.

I am convinced, sir, and I think I can anticipate a general agreement from the members of this chamber in the proposition, that the desire of the people for this change, if there be a desire, is not a very active and violent feeling. It is a rather mild assent to a proposition which is suggested to them as an appropriate remedy for certain ascertained and recognized evils. There is, we all know, a general tendency in all democracies to favor propositions which look to the extension of power at the polls. Extension of suffrage, extension of the

direct power of the voters at the polls, naturally receive assent at first blush.

There is another tendency which is natural and in which we all share, and that is that when an evil is recognized, and some one suggests that such and such a provision of law will cure the evil, our interest is attracted and our support is conciliated for the proposed measure.

I submit that what the people of the country really want is to have certain evils which they recognize in the present election of Senators cured, and that they are quite indifferent about this change except as it is certified to them to be a sure cure for the evils. Whether it will be a cure or not has been little discussed and little considered by the people of the United States, and it has been little discussed and little considered by the Senate.

The evil which the people of the country wish to see cured, and which I wish to see cured with them, and we all do, consists of certain patent defects in the working of the system of election of Senators by the state legislatures.

The first of those is a defect in the execution of the law which requires them to select. It is the deadlock that exists so frequently. The inexplicable delay of the legislature of Montana to return my friend, the Senator from Montana [Mr. Carter], the obstinacy of all branches of the Democratic party in the legislature of New York, the reluctance of the legislature of Iowa to follow any of its great and gifted leaders, all these cause dissatisfaction on the part of the people, and, I believe, constitute the chief reason for the assent of the people to propositions to change the manner of election.

But, Mr. President, is it not our duty to say to the people of the United States that these deadlocks come not from the constitutional provision, that they come from our statute of 1866? They can be ended forever on any day by this Con-

gress through a simple amendment of the statute. For the deadlocks arise from the fact that our statute requires a majority vote, and everywhere among people of independence and individual will it is a difficult thing to secure a majority vote.

If we chose today to amend our statute so that the legislatures of these states could elect by a plurality, they would elect tomorrow. If we chose to say that in any legislature where a majority vote should not be obtained within thirty days of the beginning of the Congress in which the successful candidate was to take his seat, there should be an election by plurality, in every one there would be an election the day after the period expired. And what is more, there would be majorities obtained in order to avoid those elections by pluralities.

But we have not chosen to do it. We have fallen upon times when it seems as if not the last thing, but the first thing that is to be done to cure an evil, is to amend the Constitution of the United States. Mr. President, this very joint resolution proposing to amend the Constitution of the United States will force us to abandon the majority rule and to entrust the election of Senators to a plurality, for never can the Senate of the United States maintain a working force if a majority vote is required for the election of Senators by the people of the several states.

I appeal to a universal recognition of the fact that it will not be practicable to have Senators elected under a requirement of a majority vote in case this amendment to the Constitution is adopted. In every close state, the outlying parties, the irreconcilables, not occasionally or accidentally, but as a rule, poll more votes than the difference between the two great parties, and that means that, as a rule, in the close states of the Union, no one is elected by a majority vote.

So, sir, we are proposing to cure this evil by an amendment of the Constitution which lands us in the same position as to the rule of majority or plurality that we would reach if we cured it as we can cure it absolutely, by an amendment of our statute.

But there is another reason why the people are dissatisfied with the discharge of the functions of our state legislatures. From time to time there are rumors, suspicions, and occasionally proofs of corrupt conduct on the part of state legislatures, and from time to time a belief that state legislatures have been influenced by personal considerations or controlled by extra-official influences in the performance of their duty.

Mr. President, we are too apt, in having our attention fixed upon the exceptional, to forget the usual. It is true that what have long been known in this chamber as forbidden and abhorrent forces do sometimes affect the election of a Senator; but it is only occasional, and the great body of the members of the Senate are, and always have been, elected as the free and intelligent judgment of their state legislatures dictate.

There is no claim, sir, that I have heard, certainly there has been no ground suggested to sustain a claim, that an honest and intelligent legislature, fairly canvassing the abilities and the character of the men who can best serve their country as Senators for their states, cannot make as good a choice, if not a better choice, than the electorate at large.

There has been no claim, or certainly no ground stated to sustain a claim, that the wise men who framed our Constitution were mistaken in their belief that wise and intelligent and faithful state legislatures would make the best possible choice for Senators of the United States.

No; the real ground is that, arguing from these exceptional and occasional cases, the people of the United States have been led to believe that the legislatures of their states are

unfaithful to their trust in making their selections, and that they will continue unfaithful.

Mr. President, what is the remedy the people of the United States should seek, if this be true ? Are they to abandon the performance of their duty in the election of their state legislatures ? Are they to abandon the system, rather than reform the system ? This whole proposition rests upon the postulate of the incapacity of the people of the United States to elect honest and faithful legislatures. If the framers of the resolution had made it read so that it would express the true principle on which they base it, they would have made it read like this:

> WHEREAS, The people of the several states have proved incompetent to select honest and faithful legislators in their own states:
>
> *Resolved*, That the Constitution of the United States be so amended as to relieve the people from the consequences of their incompetency by taking from the state legislatures the power to choose Senators of the United States and vesting that power in the same incompetent hands.

But, Mr. President, if the people of our states are to abandon the attempt and be faithless to the duty to elect honest and faithful legislatures, what becomes of the governments of our states ? In the growing complication of life, the daily increasing interdependence of all men under our highly developed social system, under which for food, for clothing, for shelter, for fuel, for health, for opportunities for business and for transportation, at every side and on every occasion in life we are dependent on each other, day by day we grow to rely more and more on the government that is regulating all the agencies that are necessary to our lives. What government shall perform that function ? If the state government is abandoned, if we recognize the fact that we cannot have honest legislatures, sir, the tide that now sets toward the Federal Government will swell in volume and in power. Here is a power that can answer the demands of life.

Let me tell the gentlemen who are solicitous for the preservation of the sovereignty of their states, that there is but one way in which they can preserve that sovereignty, and that is by repudiating absolutely and forever the fundamental doctrine upon which this resolution proceeds. Let them go home to their states when this session ends and invoke the patriotism of their people to make the government of their states worthy of the great duties that rest upon them and competent to preserve the autonomy of their states against that incursion of Federal power which is being continually urged, urged, urged, by those who fail to find satisfaction from the governments of the states.

In my humble judgment, sir, the most vital thing to be done in the United States today is to strengthen the legislatures of the states. I fear the breaking down of the government of the United States by the accumulation of demands upon it, through the gradual weakening of the state governments, through the failure of the state governments to keep pace with the continually increasing demands of our social and business life.

We have come very near the limit, sir, of what we can competently do, very near the limit of what we can do as well as it ought to be done. Our executive officers are overburdened. The business of this Congress is conducted with less and less knowledge on the part of the members of the body in general as to what the committees have been doing. We are forced session by session to more complete reliance upon the reports of the committees, with less and less consideration from the members of the Congress at large. Our judicial force is being overburdened and our calendars clogged, and we are looking about for ways to relieve this court and that from too heavy a burden, and to prevent the law's delays.

Let us continue upon the theory that state governments are corrupt and incompetent. The time will come when the

Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the states; and then sooner or later the people of the country will reject a government that has subjected their personal and intimate neighborhood affairs to the control of a central power in Washington, and then, in the place of competent states governing their own affairs, we shall go through the cycle of concentration of power at the center while the states dwindle into insignificance, and ultimately the breaking up of the great Republic upon new lines of separation.

Mr. President, there is another view of the fundamental proposition on which this resolution rests. It is an expression of distrust for representative government. It does not stand alone. It is a part of the great movement which has been going on now in these recent years throughout the country, and in which our people have been drifting away from their trust in representative government. These modern constitutions which are filled with specific provisions, limiting and directing the legislature in every direction, furnishing such startling contrasts to the simplicity of the Constitution of the United States, are an expression of distrust in representative government. The "initiative" is an expression of distrust in representative government. The "referendum" is an expression of distrust in representative government.

This resolution is an expression of the same sentiment. And strangely, sir, this movement comes at the very time when the development of our country in its business and social and political life makes it all the more necessary that we should depend upon representative government. We have gone far, far away from the days of the old New England town meetings. I doubt if some of the Senators coming from states of small population realize how far we have gone

in the great industrial communities of the East and the Middle West from that condition in which direct democratic government is possible.

Mr. President, this whole series of expressions of distrust, the detailed limiting constitutions, the initiative, the referendum, the amendment of the Constitution which is now before us, are all an expression of that weakness of democracies which it is the function of the Constitution to guard democracies themselves against.

Mr. President, what is to become of the state legislatures if we follow the principles of this resolution? If you rob them of power, of dignity, of consequence, what will be the personnel of the state legislatures? We have had illustrations. The boards of aldermen in some of our American cities, originally bodies of high consideration, filled by citizens of consequence and of high standing among their fellows, have dwindled and sunk to insignificance and worthlessness, as power after power has been taken away from them. Once begin the progress in that direction by taking the first step based upon the principle of this resolution and you will find the members of our state legislatures growing less and less competent, less and less worthy of trust, and less and less efficient in the performance of their duties.

You can never develop competent and trusted bodies of public servants by expressing distrust of them, by taking power away from them, by holding them up to the world as being unworthy of confidence. Honest men, good men, self-respecting men, men whose standing in their community makes it desirable for the public service that they shall go into our state legislatures, will never subject themselves to be ranked in bodies suspected and discredited and deprived of power.

Mr. President, this resolution providing for an amendment is not an expression of confidence in the people; it is an

expression of distrust in the people. It is not progress; it is a slipping back. It is not an improvement on our system of government; it is an abandonment of our system of government.

The true remedy for the evils that we see is not to abandon our duty, but to perform it. Sir, there is no weaker course for men to take than to endeavor to make up for the failure to do their duty by changing the form of the duty. This is a proposition that the people of the several states who have stayed away from the polls, who have been deaf to the considerations of public interest, who have allowed personal favoritism to supplant their desire to select the best public servants, who have been bought to cast their franchises, as the people of Adams County, Ohio, were bought, instead of curing themselves and performing their duty in the election of their state legislatures, shall try another way to select Senators of the United States. It is a proposition that the people who cannot elect honest men from their own neighbors can elect honest men to the Senate of the United States.

Sir, what vote ever cast by an American citizen can be cast with a stronger probability that it is well informed than a vote for a member of his legislature ? He is a neighbor; he is a man whom he has known all his life; he knows all about him. How can the men who are unable or unwilling to perform the duty of making a selection of an honest and faithful legislator from their own vicinage improve upon their performance in the selection of a candidate in a statewide election of candidates whom most of them know very little or nothing about, except what they get from the newspapers ?

Sir, apart from that, it is never possible to cure neglect of duty by changing the form. There is but one safety for a popular government. No matter what constitutions you have or what statutes you enact, sooner or later you come to

the polls; and if you do not have virtue and public spirit there, your government goes down.

I press upon the Senate now the duty of saying that it will not give its assent to any attempt at an evasion of that duty by the people of the United States. The pathway lies clear before them under the Constitution. If they will do their duty, the Constitution needs no amendment. If they do not do their duty, you can amend the Constitution a thousand times without any utility. Here, if anywhere, the truth ought to be told; here, if anywhere, should be found men with the courage to say to their own constituents: "The trouble in the election of Senators of the United States is not in the Constitution; it is with you; it is because you are not doing your duty." If there be no voice found in this land with authority and power to reach the minds of our people with such a message, then we are caucusing over idle words when we talk of an amendment to the Constitution.

Mr. President, it is wholly unnecessary to abandon the attempt to elect honest legislatures. The whole purpose of relieving and remedying the evil which has led to this agitation for an amendment to the Constitution can be accomplished, and it is in process of being accomplished, without an amendment. We are today in a condition of affairs political, social, and business which is but temporary. The enormous increase in the productive capacity of mankind, followed by an enormous increase of wealth, an increase which always in the beginning is congested before the processes of distribution are fully at work, is in active operation. The necessity for a readjustment of the relations of government to the great properties that constitute and continually create wealth, to the great enterprises through which that wealth is gained and is continued — the necessity for a readjustment of the relations of government to these new conditions has led to a control over our state legislatures in many cases which is

abnormal, which is to be condemned, and which has been the cause of practically and substantially all the evils that underlie the desire for a reform. That control has been exercised in part through a form of political organization which grew up under simpler conditions and is in many respects outgrown by our people, and in part by the direct application of the wealth which was seeking to save itself from destruction in the readjustment of conditions to influence the action of legislators.

I say that condition is temporary. I say the process of relieving it is going on, and is going on all over this land. I think it has been proceeding longer in the Southern states and then in the Western states, and now in the Eastern states. With many of the expedients for the readjustment I do not agree; with many of them I do agree. Of this I am certain, that, altogether, they exhibit the strivings of a great democracy adjusting itself to new conditions, and they are bound to result in a successful accomplishment. The pendulum will swing to and fro. Experiments will be tried and abandoned. Experiments will be tried and found successful here, and needing modification there; but ultimately we shall come back to a new adjustment under the new relations, having all the competency of popular government that existed before the great increase of wealth in our generation.

Mr. President, the proposers of this joint resolution ask that we shall make one of the first steps in this great experimental process, the irrevocable step, of amending the Constitution of the United States. Ah, Mr. President, that is an inconsiderate proposal. It is hardly worthy of grave and experienced legislators. The time may come, after all these experiments have been worked out, when it will be found necessary to amend the Constitution. I do not believe it will; I am confident that under the broad terms of that instrument, which has been sufficient for all the growth and

change of a century and a quarter, the process of reform which has now begun, will go on to a successful end, in conformity to the Constitution as it is. But, if I am wrong, if at some time or other it becomes needful to amend the Constitution for the purpose of remedying evils, let us amend it after the experiment, and not at the beginning; let us do it as the result of that experience which brings wisdom, and not as the result of those conjectures which lead to continual change.

Mr. President, there are specific reasons against this change. The first and great reason in my mind is that it is inconsistent with the fundamental design of the Senate. The purpose of the Constitution was to create in the Senate a body which would be as unlike as possible to the other House. It was to be a body more secure in tenure, different in the manner of its election, different in its responsibility, more conservative, more deliberate than the other House, which responds year by year to every movement of the public mind and the public feeling. As the limitations of the Constitution were set up by the American democracy to protect them against themselves in every impulse to violate the fundamental rules of justice, so the Senate was established by the Constitution to protect the American democracy against itself in the legislation which was required under the Constitution.

The framers of the Constitution realized that the weakness of democracy is the liability to continual change; they realized that there needed to be some guardian of the sober second thought; and so they created the Senate to fulfill that high and vitally important duty. Mr. President, this change tends to decrease the difference between the Senate and the lower House. It tends to make the two more alike; it tends to make the function of the Senate less distinctive, and to reduce the benefit which the Senate can render to the public service.

There has been a restiveness in the country at times, Mr. President, over the delay of the Senate; but when you examine the statutes, and when you talk with your fellow-citizens wherever you may go throughout the country, of whatever calling or condition in life, you will find that America has suffered not from too little, but from too much legislation; not from too much consideration, but from too hasty and inconsiderate action; and if you will probe down into that universal consciousness of the people that is never wrong, you will find that there rests a conviction which proves beyond the possibility of doubt that in the delay, in the long-drawn discussion, in the deliberate and unhurried action of the Senate, it has during all its existence performed its duty to the Government and to the people of the United States.

This change would tend to decrease the peculiar quality and character of the Senate which has enabled it to perform its duty.

This change would interfere with one of the great compromises of the Constitution, and would lead the minds of our people up to the point where they look over into the constitution of the Senate — and let me say to the gentlemen who are here as Senators for states with but a few thousand or few hundred thousand people, states with 84,000, with 124,000, with 300,000 population, which have the same representation as Illinois, with her five millions and nearly six, Pennsylvania, with six millions and nearly seven, and New York, with nine millions, that they cannot afford to put these great industrial communities in an attitude where they feel that the honorable obligation of the great compromise of the Constitution has been taken away.

This change, sir, would prevent the Senate from having the benefit of the service of a large class of citizens who are specially qualified by character and training to render a peculiar kind of service specially needed for the purposes of the Sen-

ate; men who by lives of experience and effort have attained the respect of their fellow-citizens and who are willing to undertake the burdens of public office, but are unwilling to seek it; men who will accept the burden as a patriotic duty, accept it doubtless with mingled feelings of satisfaction at the honor and dissatisfaction with the burden, the disturbance of life, the abuse of the press, the controversies about performance of duty, but who never would subject themselves to the disagreeable incidents, the labor, the strife, the personalities of a political campaign.

Mr. President, I do not mean to say — I beg that no one who hears me will for a moment think that I consider that such men as I have described are any better or more useful to the public than the men who are younger and full of the energy of life and the willingness for strife. No; if we can have but one class, then let us have the young and the vigorous; but, Mr. President, we are not confined to the choice of one. We can have both; and it was the purpose of the creation of the Senate that it should contain men who should be the elder statesmen and who should answer to the universal appreciation of the dignity and deliberate judgment involved in the title, Senator.

This change will exile from the floor of the Senate men who answer closely to many of the greatest names in the glorious history of this body. Still you approach nearer and nearer to identity with the lower House, to identity with those functions that it is necessary the lower House should perform, identity with those characteristics that it is necessary the lower House should have and which ought not to be duplicated here, else our usefulness will greatly disappear.

Mr. President, this change would take the direct responsibility of Senators for their actions from the states legislatures to the people at the polls. The members of the state legislature — I am talking about an honest and faithful state legis-

lature, such as I know our people can have if they do their duty — are familiar with the incidents and the difficulties of legislation. They know how necessary it is that in order to accomplish beneficent results mutual concessions shall be made. They know how impossible it is that any one man, or any one locality, or any one state can have all of its own way. When members of this body have to explain to the state legislature the reasons for their action, they meet minds that are competent and trained for the appreciation of their explanation. The people at large have far less understanding upon the subject that I am now speaking of than their legislature; and the inevitable result of such a change as this will be to increase the unyielding opposition of the position of one state and its Senators to the position of other states and their Senators. It will largely do away with the benefit of discussion and comparison of views and mutual concessions, and that fair and open-minded yielding to the argument of our fellows, which is the essential of good legislation. This will cease to be a deliberative body if every Senator has to convince, to explain to the great body of the people of his state every act he performs and every concession he makes.

Mr. President, it is unnecessary to demand or to provide for a reform in the constitution of the Senate upon the theory that the existing system has failed. I grant you that occasionally bad men are sent to the Senate; occasionally a man is sent here who would not have been chosen by a fair and honest choice of the people of his state; but, sir, they find their level and they find it in innocuous insignificance here. I undertake to say — I am so young a member of this body that I can say it, the basis of my experience and my observation have been so largely formed while holding executive positions and not as a member of this body — I undertake to say and to maintain here or anywhere that never in this world has any institution of government

wrought out more successful results than the provision of the American Constitution for the selection of Senators of the United States. Exercising a power more varied than any other deliberative body in the world; sharing in the legislative and executive and judicial functions; with control over the laws providing for the raising and the expenditure of revenue, through its constitutional power of amendment; with control over the appointments to offices by the necessity for its confirmation; with control over foreign affairs, through the necessity of its consent to the ratification of treaties; with the function, that highest of all judicial functions, constituting it the court for the trial of impeachments, — after a century and a quarter of life, I declare to you and to my countrymen that the Senate of the United States has performed its duty loyally, faithfully, and competently, and has furnished to the history of its country a line of illustrious names and a record of great achievement which provide one of the most convincing proofs the world has yet had that popular government through representative institutions is a possibility among men.

When we consider the multitude of failures that line the pathway of history, when we consider the multitude of difficulties that stand in the way of successful government, let us pause before we abandon the character and the constitution of a body which has proved itself and been proven as has the Senate of the United States.

Mr. President, one of the illustrations of the dangers of intermeddling with this delicate relation between the states and the National Government established in our Constitution is found in this joint resolution. The gentlemen who fathered this joint resolution have found that they could not make this change without going on and proposing another amendment striking at the relation between the states and the National Government at a vital point. The interde-

pendence of these provisions of the Constitution is well illustrated by this joint resolution. The danger of tampering with one cog, one spring, one lever, one wheel of this delicate machinery is well illustrated by the fact that in the same breath that the committee reports a resolution for a change in the manner of electing Senators it reports a resolution to revolutionize the relation between the National Government and the states. I say " revolutionize " advisedly. The theory of our Constitution was that regarding all matters within the limit of the Constitution the relation of the National Government should be a direct relation between the Government and the people; that it should operate upon the people. It was that these Senators who are about me are not ambassadors from a foreign State, but they are officers of the United States; that their primary obligation is not to any one state, but it is to the common good of the commonwealth of the United States. And the theory of the Constitution was that the National Government should be invested with all the powers necessary for the preservation of its national life and the execution of its national powers and the performance of its national duties, so that it would not be dependent in any respect upon the will or pleasure of any state. That was the fundamental change from the Confederation to the Union under the Constitution.

So the Constitution, after providing that the members of the House of Representatives should be elected by the people and that the members of the Senate should be elected by the legislatures, provided that the times and places and manner of holding elections shall be prescribed.

As I have already said, it is a peremptory command, so that the duty is performed as a duty under the Constitution of the United States and not at the will or pleasure of the state itself. They provided that when the times, places, and manner of holding elections for Senators and Representatives

have been prescribed by the legislature of a state, in performance of that duty under the national Constitution, the Congress itself may at any time by law make or alter such regulations.

Now, I submit that the proposed substitute, which takes out of the Constitution the peremptory command resting upon the legislatures of the states, and which takes out of the Constitution the right of the National Government to make or alter regulations for the selection of the members of the Senate, revolutionizes the relations between the Government of the United States and the government of the states. We no longer have, if this amendment is adopted, the power of self-preservation and self-perpetuation.

James Madison, of Virginia, was the great advocate of the provision which gave to the Government of the United States the power, in the last resort, and, if ever need be, to control and direct and require the elections which were to determine the constitution of both bodies of its national legislature. Now, sir, we are about to abandon it, if this resolution is adopted.

Mr. President, the provision which is now to be wiped out of the Constitution was the basis of the Federal election law.

My memory goes back far enough to remember the condition of affairs in the state of New York when the Federal election law of 1870 was first applied. For several years while it was in force I happened to be the district-attorney of the United States for the southern district of New York and to be charged with the enforcement of it. I beg to assure my colleagues in the Senate that the application of that Federal election law broke up a condition of corruption in the elections in the city of New York which made the election of Senators and presidential electors a mere matter of the dictation of one man. Ballot-box stuffing, false counting,

repeating in large parts of that city were the rule rather than the exception, and it was only the application of the Federal election law of 1870 which made possible a reform in those conditions and led the way which the state of New York itself followed by its own enactments, designed to continue the honesty of elections produced by the application of the Federal law.

I do not know, sir, that the time will ever come — I hope it never will — when it will be necessary to apply another Federal election law to prevent the creation of members of this body from being a shame and a disgrace, but I protest against robbing our nation of the power to exercise such control over the selection of the men who are to constitute its Government.

I am deeply sympathetic, Mr. President, with our friends from the South, who are dealing with the difficult problem of adjusting the relations between the white and the black populations of their states. I look back over our history and realize that mistakes have been made in the attitude of that part of the country where I was born and bred and where I received my first ideas of the political policy of our country. I would not now like to see an attempt to stretch out the hand of Federal power and interfere with the progress of our friends in the South toward the solution of that difficult and embarrassing problem.

But, Mr. President, I must protest with all the energy of which I am capable against our country's robbing itself of the power to do so if need be.

Freely conceding to our friends of the South the manifold shortcomings of my own people in the North, they must not think hardly of me if I say that from time to time things are done in some parts of the South that the states ought to prevent, and if they do not, that the country must prevent the moment they touch the Constitution of our Government.

It is true that in the state of New York we cannot afford to be without the safeguard always standing back of our political procedure of power in the nation to compel purity, fairness, honesty. No state can afford it; no state, North or South, can afford it; and, above all, loyalty to the nation cannot afford it.

Mr. President, it is true that this resolution would leave in the Constitution that provision which makes each house the judge of the elections and qualifications of its members; but, sir, it would rob this house of the power to require the regulations regarding the elections of members to be such that we could exercise the power of judging of the elections.

Sir, we found it necessary in 1842 to change the method of electing Congressmen. We found it necessary in 1866 to reach out our hand and change the methods by which the state legislatures were electing members of the Senate. With that experience before us, will gentlemen tell us that never in the long process of time is it possible that it will be requisite for the National Government to reach out its hand and in order that the election of Senators shall be so conducted as to make it possible to perform the duties of government in judging of their election, to control and direct and modify the regulations under which they are elected ?

It is true, Mr. President, that the fourteenth and fifteenth amendments will still remain in the Constitution, but, so far as those amendments affect the exercise of the power of the states or of the individual voters in the states to constitute a member of this body, the second part of this resolution would rob the Government of the United States of the power to make those preliminary dispositions regarding elections necessary for the enforcement of the amendments.

There has been some discussion here as to whether the amendment offered by the Senator from Utah [Mr. Sutherland] proposed the granting of a new power to the National

Government over the elections in the state or whether the resolution proposed by the committee provides for taking away an existing power.

Let me state what I think it is. As the Constitution now stands, Senators are elected by legislatures whose proceedings are under the control and regulation of the national Congress. The resolution proposes to transfer the power of election from the legislatures to the popular electorate without extending to the new electorate that power of national control. The Sutherland amendment proposes to carry over to the new body of electors the same control which the present Constitution attaches to the existing power of electors.

Now, Mr. President, we are told that that is too high a price for the South to pay. The Senator from Mississippi [Mr. Percy] has said to us:

> Notwithstanding the suggestions of the Senators from New York and Montana, the day may be far distant, if it will ever come, when any political party will again find it expedient to attempt to enact Federal laws for the supervision of elections. But this optimistic hope furnishes no safe reason for extending the power of the Government as to the enactment of such laws, and I would not be dealing in frankness with our Republican allies, who are supporting us in this measure, and for whose patriotism and earnestness in the support of it I have the profoundest respect, if I did not say to them that in my judgment the extension of the power of the Federal Government, as required by the Sutherland amendment, is a price greater than the South is willing to pay for the election of Senators by the direct vote of the people. I have no hesitancy in saying that it is a price greater than it should pay.

Mr. President, I beg leave to say to the Senator from Mississippi and to his Republican allies, from a heart full of sympathy with all measures of conciliation between the two parts of the country, that the time has not yet come when the people of this nation are entering the market-place to buy from them or from any of them the right to preserve and protect by the exercise of our own national power the Government of the United States under its Constitution.

ELECTION OF SENATORS BY DIRECT VOTE

ADDRESS IN THE SENATE OF THE UNITED STATES, MAY 23, 1911

THIS subject has been very fully debated, and I do not wish to occupy the time of the Senate by going over the same arguments that I myself have already made or by repeating the arguments of others. I do wish, before the vote is taken, to state the position I take and the views which influence me to vote as I shall vote.

I shall vote for the substitute offered by the Senator from Kansas [Mr. Bristow], and I shall then vote against the proposition to amend the Constitution. I shall vote for the substitute because it strikes out from the proposed amendment the amendment of section 4 of Article I, and I shall vote against the proposition as a whole because I am opposed to the amendment of section 3 of Article I.

There are two separate, distinct, and independent amendments of the Constitution included in the joint resolution as reported by the Committee on the Judiciary. One is an amendment to section 3, so as to provide for the election of Senators by the people instead of their election by the state legislatures. The other is an amendment of section 4 of Article I, so as to take away from the Congress of the United States the power to make or alter the regulations which may be prescribed by the several state legislatures in respect of the choosing of Senators.

The second amendment — that is to section 4 — is wholly unnecessary to the effectiveness of the first amendment, relating to the election of Senators by the people. There is no occasion whatever to destroy the power and authority

of the Government of the United States over the process of constituting its own legislative body, in order to secure the change of election from a state legislature to the people of the several states. It is a new, additional, independent, disconnected, and unnecessary amendment to the Constitution. It has no place in the deliberations of this body or of any body upon the change in the manner of electing Senators. A change from the election by the legislature to an election by the people can be made with or without the other amendment, and wholly unaffected by it.

The people of the United States may wish for one and may not wish for the other. They ought not to be compelled to vote for one, which they may not wish for, as a condition of securing the other, which they may wish for. Each should stand upon its own basis. The people of the country should have an opportunity to vote to change the manner of the election of Senators, if they wish for it, without being compelled, as the price of getting it, to vote for the destruction of that control which the National Government has had from the beginning over the constitution of this great branch of the national institution.

I believe that the adoption of this amendment to section 4, which takes away the power of Congress to make in the last resort, if it finds it necessary, regulations to secure the effective, the honest, the uncontrolled selections of members of the Senate, would be a reversal of the theory of the Constitution. I believe that it would strike a blow at that power of independent self-support which is essential to the perpetuity and the effectiveness of government. I believe that it would be a reversion to the theory of the old confederation, under which the Government of the United States was dependent upon the states, and an abandonment of the theory of the Constitution under which we live, which was that the Government of the United States should stand erect and self-sus-

taining and have all the powers necessary for the maintenance of national life, dependent upon no state, upon no state legislature, and upon no power whatever except the power of the nation itself. . . .

We have had occasion to exercise the power of regulation both in regard to the election of members of the House of Representatives and in regard to the election of Senators. Congress in 1842 passed a statute to regulate the election of members of the House. It was found necessary in order to have effective and proper elections. It has passed repeated statutes since then, notably in 1872, and our elections are being conducted now under those statutes passed by the Congress. Congress has found occasion to regulate the election of Senators, and those elections are being conducted now under the statute passed in 1866. No man can say that the time will not come again when it will be necessary for the Congress, in order to secure uniformity, in order to secure effectiveness, in order to prevent abuses, to exercise its power in respect of regulating the times and the manner of electing members to each House of the national legislature.

But it was not my purpose, as I have already stated, to re-argue this case. I have stated the substantial grounds upon which I prefer that the substitute offered by the Senator from Kansas shall take the place of the original joint resolution. I shall oppose the resolution, then, on the ground that I think it is inexpedient and unnecessary to make any amendment of the Constitution at all in regard to the election of Senators. I believe that it will result in a deterioration of the personnel of the Senate. I believe that it will keep out of the Senate a large and important element well adapted to the performance of the peculiar and special duty of the Senate in our system of government. I believe that all the abuses which have led to such a desire for this change on the part of the people of the country can be cured by a simple amend-

ment of the law, by amending the statute rather than by amending the Constitution of the United States.

Such a step I have already introduced. It was introduced at the last session and favorably reported by the Committee on Privileges and Elections. It has been introduced again at this session and is now pending before the Committee on Privileges and Elections. It provides for the election of Senators by a plurality, which is something that would be inevitable if we transfer the right of election from the legislatures to the people. It cures the evils which we have had by a simple amendment of the law. It affords an opportunity for a majority rule to control for a period which is stated in the bill as introduced at twenty days, after the first convening of the two houses of the legislature. After the operation of twenty days has failed to produce an election by the majority rule, it provides for the application of a plurality rule.

I fully recognize the fact that we have going on throughout a large part of the country a process of change, a process of experiment in the way of modifying our governmental institutions. I recognize the fact that the people of many states have become dissatisfied with the way in which their political machinery has acted and that they desire to change it. I have great sympathy with the feeling and take great interest in the experiments that are being tried. I believe that good will come from the awakened interest of the people of the country in their own political affairs and from their determination to take a part in their affairs and to make their will effective.

But it is a process of experiment. We cannot change the institutions of more than a century without long trial and consideration. Experiments will fail; experiments will not succeed. All of us will see opportunities for modification and improvement. No one of us can evolve from his own thought,

not all of us together can by conference produce results which we may feel sure are better than the methods devised by the framers of our Government, until the results have been put to the test of practical application.

The system under which we live has produced the best results that ever have come from the experiments of mankind in government. We have received from our present institutions manifold blessings, and in the providence of God have wrought out under those institutions results which have made for the happiness, for the liberty, for the advancement of all mankind. With all history strewn with the wrecks of government, with human nature still unchanged, I would hesitate long before assuming that my own judgment, or the judgment of all of us, can improve the system and framework of our Government, except upon experiment and demonstration by practical application.

I do not like to see experiments begin or proceed in their early stages by amendments to the Constitution in advance of their being tried out fully. Amendments should be the result of long deliberation and trial. They should not initiate deliberation and trial.

For these reasons, I shall take the course regarding the substitute and the joint resolution which I have indicated, whether the substitute be adopted or not.

THE CASE OF SENATOR LORIMER

ADDRESS IN THE SENATE OF THE UNITED STATES FEBRUARY 3, 1911

William Lorimer, of Illinois, after serving seven terms in the House of Representatives, was elected United States Senator from Illinois by the legislature of that state, May 26, 1909, for the term 1909–1915.

Mr. Lorimer took his seat June 18, 1909, and on June 20, 1910, the Senate passed a resolution authorizing and directing the Committee on Privileges and Elections to investigate his election. This Committee reported December 21, 1910, to the effect that his election had not been invalidated by corrupt practices, and a minority report was submitted January 9, 1911.

While these reports were under discussion, Mr. Root made the address which follows.

On March 1, 1911, a resolution declaring Mr. Lorimer's election invalid was defeated by a vote of 40 to 46. On June 2, 1911, the Senate passed a resolution appointing a special committee to investigate again the Lorimer case. The majority of this special committee reported in favor of Mr. Lorimer, May 20, 1912, and on July 13, 1912, a resolution of the minority that corrupt methods and practices had rendered Mr. Lorimer's election invalid, was adopted by the Senate by a vote of 55 to 28.

ON the twentieth of June last the Senate passed a resolution which directed the Committee on Privileges and Elections —

to investigate certain charges against William Lorimer, a Senator from the state of Illinois, and to report to the Senate whether in the election of said William Lorimer as a Senator of the United States from said state of Illinois there were used or employed corrupt methods or practices.

The Committee on Privileges and Elections have now reported, not whether there were used or employed corrupt methods or practices in the election of William Lorimer, but that, in their opinion, the title of Mr. Lorimer to his seat in the Senate has not been shown to be invalid by the use or employment of corrupt methods or practices; and the committee request to be discharged from further consideration of the resolution.

It is a fair inference, from a comparison between the terms of the resolution and the report of the committee, that the

committee were of the opinion that there were corrupt practices used and employed in the election of Mr. Lorimer, but that the legal effect of such corrupt methods and practices was not such as to invalidate his election. That view of the true meaning of the committee's report is supported by an examination of the testimony which was before them.

I am constrained, upon a careful examination of the testimony, to disagree with the conclusions of the committee. I do it with great regret; I do it unwillingly, because I have the highest respect for the members of the committee and for their judgment. I know that they are trained and able men and that they are men of the purest patriotism and of a character which makes it impossible even to discuss the integrity of their action. It is difficult for me to reconcile myself to taking a different view of the facts in this case from that which these trusted and honored colleagues have taken after hearing the witnesses; and, Mr. President, I differ from them with great regret, because the conclusion which I have reached involves the interest, and, if agreed to by the Senate involves the injury, of a gentleman toward whom I have the kindliest feelings, Mr. Lorimer; involves a disgrace to the great state of Illinois and to the country of which that state is so great and potent a part. But I cannot come to any different conclusion.

I differ from the committee, sir, not only as to their conclusion, but as to the view of the scope and nature of their duties, which I believe played a considerable part in leading them to their conclusion.

The charges against Mr. Lorimer were presented to the committee by counsel for the *Chicago Tribune*. The committee deemed it to be their duty to treat the charges from the beginning to the end as they would have treated a private complaint against a private defendant, holding the complainant to strict proof as a court would have held a private

litigant, and the committee concluded that the charges had not been sustained.

It is true, as the Senator from Texas [Mr. Bailey] said upon this floor a few days ago, that the wisdom of ages has shown that the best way to get at the truth of a case is to have two parties and to hear their testimony and their arguments; but, Mr. President, who has made the *Chicago Tribune* a party to an investigation of a question that concerns the integrity, the purity, the reputation, and the authority of the Senate of the United States? When have we committed to that newspaper, or to any newspaper, to the owners of a paper and their counsel, or to any man, the guardianship of our honor and the preservation of the integrity of our Government? No, Mr. President, when it once appeared to the committee that there was substantial ground for the charges, when one witness had appeared before them and given testimony which, if believed, established the fact of bribery, then from that time, I submit to the Senate, it became the duty of the Committee on Privileges and Elections to do what the Senate resolution directed them to do — to investigate the charges and to report to the Senate, not whether the *Chicago Tribune* had established a case, but whether in the election there were used or employed corrupt methods or practices.

And, Mr. President, the case is full of opportunities of which a different view would have led the committee undoubtedly to avail themselves to secure fuller and more satisfactory information upon the subject of the resolution. The evidence taken points clearly to avenue after avenue which could be followed down to probable information upon the subject of the resolution; but, in taking the view of their duty which they did, the committee logically and naturally excluded much information which was brought forth by questions put to witnesses, and which would naturally have opened opportunity for further information.

One effect of this view taken by the committee is a prejudice — a natural prejudice — in which I confess, sir, I share. We have heard going about this chamber in conversation among Senators, bruited about through the Capitol, the expression of prejudice against this newspaper prosecution, against the method and the spirit exhibited by the *Chicago Tribune* in its prosecution of this case, which has been characterized by many persons not interested in the case as not merely a prosecution, but a persecution. Mr. President, I have said that I share that feeling regarding newspaper prosecutions. I do not think the combination of the tremendous power of a great daily paper and the function of a prosecuting officer is a combination that makes for justice. But, sir, this case is not the case of the *Chicago Tribune*; it is the case of the Senate of the United States; it is the case of the Government of the United States; it is the case of representative government the world over.

Mr. PAYNTER. Mr. President, I should like to ask the Senator a question.

The VICE-PRESIDENT. Does the Senator from New York yield to the Senator from Kentucky ?

Mr. ROOT. I do.

Mr. PAYNTER. The Senator is complaining of the action of the committee in the matter of the admission of testimony. I ask the Senator to state now what witnesses were at the command of the committee except those which were furnished by the *Chicago Tribune* ?

Mr. ROOT. I will state that, Mr. President.

Mr. PAYNTER. And in that connection I want to ask the Senator this question: What kind of an attitude would the committee have placed itself and this body in had it refused to have heard the testimony of witnesses who were offered by the *Chicago Tribune* ? I will be glad to hear the Senator on both of those questions.

Mr. Root. I have not for a moment intimated that the committee should not have heard witnesses produced by the *Chicago Tribune*. They should have heard them; but if they had taken the view of their duties which I take, they would have called still other witnesses. I will state one now. They would have called the cashier of the Holstlaw Bank, of Iuka, with the books of that bank, to determine whence came the money that Mr. Holstlaw deposited in the State Bank of Chicago on July 16, 1909. They would have called the Yarboroughs, whom disputed testimony put in the room with Mr. White when Mr. Browne was said to have come for him to take him to the interview in which White testified the offer of the bribe was made. They would have called Governor Deneen to testify, to ascertain what he knew about the transaction regarding which Mr. Lorimer told us in the Senate — that Governor Deneen favored him until the day before the vote, and then turned. . . .

Mr. President, the Senator is not quite accurate in saying that I am criticising the committee for not calling these witnesses. I am not. I am saying that the failure to call these witnesses is the natural and inevitable result of a view taken by the committee as to the scope of their duty, and that view is clearly and distinctly expressed by the committee themselves. My only criticism, whatever criticism is involved, is in differing with the opinion of the committee regarding: First, the conclusion that they report, and second, the view that the report shows they take as to the scope and nature of their duties.

But, Mr. President, we have here many hundred pages of testimony, and it is for the Senate now to pass upon the report of the committee with reference to the testimony as it is. And I beg leave to lay before the Senate such views as I have reached in the examination of that testimony.

The framework of the events to which the investigation related is familiar to all the members of the Senate. From January until May 26, 1909, the legislature of Illinois was engaged in fruitlessly balloting for a Senator to succeed Mr. Hopkins, who was then a member of the Senate.

Mr. Hopkins had received a large vote by way of instruction in the primaries, and Mr. Stringer was the primary selection of the Democratic party, and the votes ran for many weeks, for months, with the greater part of the Republicans voting for Mr. Hopkins, but a sufficient number of votes scattering about to prevent an election, and the greater part of the Democrats voting for Mr. Stringer.

On the twenty-sixth of May there was a sudden change, and the votes of a very large part of the Republicans and of the Democrats were turned to Mr. Lorimer, who up to that time had not been an avowed candidate, only an occasional scattering vote having been cast for him. On that day there were two hundred and two members of the legislature of Illinois present in the joint session of the two houses, making one hundred and two votes necessary to an election. On the ballot to which I have referred, on the roll-call of the senate, there were ten votes for Mr. Lorimer, and on the roll-call of the house there were ninety-one for Mr. Lorimer, making a total of one hundred and one votes. Thereupon seven Republican senators who had voted for Mr. Hopkins on the roll-call changed their votes from Mr. Hopkins to Mr. Lorimer, making one hundred and eight votes for Mr. Lorimer, and he was declared to be elected. Those one hundred and eight votes were fifty-three of them cast by Democrats and fifty-five by Republicans.

The investigation concerns itself with the way in which those one hundred and eight votes were procured. It is practically concentrated upon the way in which the fifty-three Democratic votes were secured, because it was a

matter for special inquiry that fifty-three Democrats should leave the candidate of their own primary and unite upon a candidate of the opposite party.

Now, there are certain undisputed facts which bear upon this inquiry as to these fifty-three Democratic votes. The first which I ask you to consider is that Mr. Lorimer was present at Springfield and in attendance at the state capital at the time of this election, and he had been there for several weeks. It appears that one of the Democrats who had been asked to vote for Mr. Lorimer raised some objection and was requested to go into the Speaker's room — this is on the day of the election — and see Mr. Lorimer.

He had asked for certain promises regarding patronage, regarding the appointment of Federal officers in his own town. He was requested to go, and he did go into the Speaker's room, and there found Mr. Lorimer; and he had with Mr. Lorimer a conversation relating to the appointment of Federal officers in his town, and it appeared to be satisfactory.

Mr. Lorimer then was present in the capitol, occupying the room of the Speaker of the assembly, and there meeting and having interviews with the members of the assembly regarding their voting for him.

The second important fact bearing upon the relation between Mr. Lorimer's election and these Democratic votes is that the agent selected by Mr. Lorimer, the chief agent to secure Democratic votes for him, was Mr. Lee O'Neil Browne. Mr. Browne was the leader of one faction of the Democrats in the assembly. There were two factions, each with a leader. Mr. Browne had between thirty and forty, and another, Mr. Tippet, had between twenty and thirty Democratic members of the legislature, and Mr. Browne was called into consultation, conference, coöperation with Mr. Lorimer and became plainly Mr. Lorimer's accredited and

authorized agent in securing votes from the Democratic side of the assembly.

This rests upon the testimony of Mr. Browne himself, and is not subject to any dispute. Mr. Browne says, after being asked about whether he had reported some facts to Mr. Lorimer:

A. Well, now, if I was giving you my best judgment as to when I first spoke to Senator Lorimer personally about the matter, I would say it was somewhere in the neighborhood of a week.

Q. A week ? —A. Somewhere.

Q. What — and then you conferred with him frequently, did you not ? — A. Oh, yes.

Q. Every day ? — A. I presume every night. The conferences were at night mostly. Every night during the stay in Springfield.

Q. Yes. And those conferences lasted some hours, didn't they ? — A. Sometimes they did, and sometimes there were a dozen of them in an evening.

Q. And you kept Senator Lorimer posted as to your movements with reference to his candidacy, did you ? — A. We all kept each other posted, just as any other campaign committee would do.

Q. Well, I am asking you whether you kept him posted as to your movements with reference to his candidacy ? — A. I have answered that.

Q. Well, did you keep him posted ? — A. We all kept each other posted.

Q. What I want to know is, did you tell Mr. Lorimer, the candidate for United States Senator, as to what you were doing toward furthering his candidacy ? — A. I presume I did.

It further appears that Mr. Browne had made a condition of bringing his followers to the support of Mr. Lorimer, that none of them should be expected to vote for Mr. Lorimer until there was satisfactory assurance that the votes would be sufficient to elect. Mr. Browne says:

Q. So you insisted that no Democrat should vote for Mr. Lorimer until you were advised that there should be enough votes, outside of the Democrats, with them, to elect him ? — A. Well, I insisted, and I made it a matter of honor, with both of them —

Mr. Lorimer and Mr. Shurtleff —

that no roll-call for Mr. Lorimer's election should be started, and that I would not consent to a single one of my followers voting for him until I became sure that there were enough with those to elect him.

He is asked now:

Q. Now, what did you do, if anything, to notify the men who belonged to your faction, who you believed would vote for Mr. Lorimer, that the vote would be taken on the twenty-sixth? — A. Well, I cannot say to you, Senator, just what course I pursued with every one of them. I know the message was carried in one way or another to each one of them that the roll-call would be put on the next day for his election, and that it was going to go through.

Q. You set in motion some machinery by which all of your friends who you believed would vote for Mr. Lorimer — I believe you said thirty — were notified that it would be called off on that day, so that all of them would be on hand, and it would be called off on that day, the twenty-sixth? — A. Well, all of them were on hand those days all of the time, Senator.

Q. You notified them that the ballot would be taken on that day? — A. Yes.

Q. Or had it done? —A. Yes.

Q. So that they might be present? — A. Yes.

I say the testimony, undisputed and unquestionable, leaves no doubt of the relation of agency between Mr. Browne and Mr. Lorimer in the securing of the Democratic votes, or at all events the thirty Democratic votes cast by followers of Mr. Browne and constituting a part of the one hundred and eight votes that elected Mr. Lorimer.

The relation of Mr. Browne as leader of these thirty voters is very well shown by his own testimony, which I will now read:

Q. As minority leader, I suppose your vote would be taken as a criterion on strictly party questions, to those who should follow you, as to party policy in voting? — A. Well, in this transaction I might say the bell-wether, so to speak, was Manny Abrahams — Emanuel Abrahams. He is the first on the list, you will see, the first Democrat; and he was a very strong and stanch adherent of mine, and, whether right or wrong, he believed what I did was right, and whenever they saw Manny Abrahams — those that wanted to know how I was going to vote — saw Manny Abrahams vote one way, that settled it.

Q. And he voted for Mr. Lorimer? — A. Yes, sir.

Q. I suppose you had an understanding with Mr. Abrahams that he was going to vote for Mr. Lorimer? — A. Oh, yes; with all of them — with all of them.

Q. And that was the criterion ? — A. Well, it was understood before the roll was called at all that morning by them all, those of my crowd.

So, Mr. Browne, the leader of his crowd in the legislature, controlling the vote of Manny Abrahams, who voted as he wished, right or wrong, Mr. Browne, the leader of this crowd, voted for Mr. Lorimer, and the crowd voted, following the bellwether, Manny Abrahams. He procured them to vote as the agent of Lorimer, secured by him to act for him, closeted with him by day and by night, reporting to him step by step, having the relation to him of a member of a campaign committee.

The inquiry narrows down to the question how Mr. Browne secured the adherence of that thirty of the faithful of his crowd who followed the bellwether. How did he secure them? What was his relation to them? It is a broad question which furnishes, when answered, a background against which all the testimony in this case must be considered and weighed.

The air of Springfield at the time was full of suspicion as to the way in which Mr. Browne controlled his crowd, as to the way in which Democratic votes were being secured. A stanch old Democrat, a Mr. Donohue, who was a member of the house and who did not vote for Mr. Lorimer, but stood by his party candidate, testified in explaining some remarks that he may have made, some questions that had been put as to the suspicion that there was bribery, and he said:

That was the general talk, and I could not trace it down; I could not tell now who said it, and then that kind of died away, and then after the election of Mr. Lorimer the thing started again that they were — everything was not straight down there at Springfield with reference to the election of United States Senator. And everybody, I think — I was suspicious myself about the way things went down there. Of course, I didn't have any direct evidence, only from general appearance, I could not see why so many Democrats were going over in a body to vote for a Republican. They may have had reasons, and be more liberal in their views than I am, and might have gone over. I could not see it that way. I am a Democrat, and I am a pretty strong partisan.

Of course suspicions are not evidence, but Mr. Donohue's view, taken at the time of this transaction, is evidence that an honest Democrat who was there saw no party policy or principle which was sufficient to account in his mind for the votes of these fifty-three Democrats for a Republican Senator. If there were motives of patriotism or policy actuating the fifty-three, they were motives locked in their own bosoms and not apparent to the other Democrats who were there.

On the floor of the assembly, on the day of the election before the vote was cast, Mr. English, a member of the house, in effect charged corruption.

Mr. Browne, for the apparent purpose of strengthening his followers, had made a speech in which he had undertaken to explain what was about to be done, and he had used the expression " we cannot cash dreams ", when that stout Democrat of the house retorted, " but you can cash votes ", and it was under the aspersion of that remark in the open house that the votes were cast.

Mr. Groves, a reputable and unimpeached witness, testified that shortly before the election a former member of the legislature came to his room in the hotel, approached him upon the subject of voting for Mr. Lorimer, and said to him: " It might be a good thing for both of us." Groves retorted that " there is not money enough in Springfield to buy my vote for Lorimer "; and he denounced him with such indignation and vehemence that the visitor exclaimed against his talking so loudly with the transom open. Groves exposed that on the floor of the assembly before the election.

Mr. Groves testifies also to a conversation before the election with Mr. Shaw, one of the men who voted for Mr. Lorimer, who was then about to vote for Mr. Lorimer, in which Mr. Groves, his suspicions excited by the attempt made upon him, put the question to Mr. Shaw, how much there was in it to vote for Lorimer. Mr. Groves testifies that Mr. Shaw said

there was a thousand dollars in it, as he understood, for the men who would vote for Mr. Lorimer.

Mr. Terrill, an unimpeached and reputable witness, who did not vote for Mr. Lorimer, testifies to this:

A. Well, Mr. Griffin, a member of the house also; I think he comes from Cook County, but I don't remember what district. He never made me any offer of cash. He asked me to vote for Mr. Lorimer. I asked him what there would be in it, and he said, " A thousand dollars, anyway."

Mr. Griffin was one of the faithful thirty that followed the bellwether, and Mr. Terrill told of that approach, of that assault upon his integrity.

Mr. Meyers, another member of the house who did not vote for Mr. Lorimer, testifies that Mr. Browne asked him to vote for Mr. Lorimer. Mr. Browne himself, the agent whose relations to this vote we are inquiring about, asked him to vote for Lorimer:

Q. Will you tell the committee what, if any, conversation you then had with Mr. Browne ? — A. I went down to his desk and sat down on a chair right beside him, and he says: " We are going to put this over today, and I would like you to go with us." I says: " Lee, I can't do it."

Q. What else ? — A. Then he says that there are some good state jobs to give away and the ready necessary. I says: " I can't help it; I can't go with you."

Q. " The ready necessary," that is correct, is it, that I repeat ? — A. Yes, sir.

Mr. Meyers, being interrogated further, said:

Mr. Austrian. What did you understand that Mr. Browne meant when he said " plenty of the ready necessary " ?

The Witness. I suppose he meant money; I did not know what else.

So, Mr. President, I say that at the time these votes were cast the air of Springfield was murky with suspicion of corruption, a suspicion now justified by the testimony of these unimpeached, honorable, credible witnesses, of attempt after attempt upon the integrity of the members of the Democratic party in the assembly of Illinois, including this attempt by Lee O'Neil Browne in person.

Mr. Holstlaw, who was a senator, testified that Senator Broderick, a Democratic senator, as was Holstlaw, assured him that there was $2,500 in it for him if he voted for Lorimer, and he did. Holstlaw has also testified to the payment of the $2,500. I shall discuss the testimony regarding that at a later period.

Three other witnesses have testified not merely to approaches, but to the actual payment of money. Mr. White, who was the originator of the charges, Mr. Link, another Democratic member of the assembly, Mr. Beckemeyer, another, all members of the faithful thirty.

Mr. President, it may be that all these men swore falsely. It may be that White, and Link, and Beckemeyer, and Holstlaw, and Meyers, and Groves, and Terrill all perjured themselves. But we are not at liberty to reject their testimony unless it is overcome by countervailing testimony of sufficient weight or unless it is found to be at variance with the true and accepted facts. And the great fact against which all of this evidence is to be considered, that furnishes the background for all these events, is this fact of the relation of Lorimer's agent, Browne, to his followers, and that fact, that underlying fact, which will either corroborate or contradict all these oaths, is established not only by a preponderance of evidence, but beyond that reasonable doubt which is permitted to stand in the way of a verdict that may cost a defendant his liberty or his life.

It happens, Mr. President, that there were two events — two meetings of followers of Browne — subsequent to the election of Lorimer in which the testimony fixes the payment of money, under such circumstances that, if the testimony be believed, there was plain bribery. The first meeting was on the twenty-first of June following the election. The second meeting was on the fifteenth of July. Both meetings were held in St. Louis. At the first the testimony of Becke-

meyer and White and Link shows a distribution of a thousand dollars each to the followers of Browne in southern Illinois, and at the second meeting, the fifteenth of July, the testimony of the same men shows a distribution of $900 each to the followers of Browne in southern Illinois.

Mr. Browne has testified that there were three meeting places where his crowd was in the habit of being called together — those of northern Illinois, in Chicago; those of central Illinois, in Springfield; and those of southern Illinois, in St. Louis. At the meeting on the fifteenth of July, when the $900 dividend was made, all the members of Mr. Browne's following in southern Illinois were present, having been summoned to that meeting by telegrams sent to them through Mr. Browne's private secretary or stenographer, Mr. Giblin.

The testimony of Link and Beckemeyer and White to the payment of the $900 to each is disputed. It is disputed only by the testimony of Mr. Wilson, who went to that meeting for Mr. Browne, in Mr. Browne's place. The testimony is corroborated, however, by several very important and indisputable facts. Of course, it is the testimony of three men against one; it is the testimony of three men who say they received the money against one who says he did not pay it. But it appears in the testimony that a year after the meeting was held, and when inquiry came to be made regarding the payment of money to these members of the legislature at that meeting, a false and fictitious and manufactured explanation of the purpose of the meeting was made up. Two of the members who were there testified to Wilson's, who went there as Browne's agent, and, they say, distributed the money, sending them letters in 1910, on the eve of the inquiry, dated back prior to July 15, 1909, and suggesting as a reason for the meeting a proposal to give a banquet to Mr. Browne.

Unfortunately, nearly all the witnesses to the meeting forgot that there was any proposal to give a banquet to Mr. Browne. All the members of the Browne following met at their customary meeting place in St. Louis, brought from their several homes in different and distant towns in the southern part of the state of Illinois, called there by telegrams for some purpose or other, and there appears in the testimony regarding that meeting no evidence whatever as to any conclusion reached, any question raised, or any action taken regarding the giving of a banquet to Mr. Browne.

It appears further in the testimony that there had been something said about a banquet to Browne, and that Browne had stamped on it or frowned on it, as Mr. Wilson, his agent, testifies. It further appears that that meeting was a meeting intended for these followers to meet Browne himself; and, of course, it could not have been a meeting for the purpose of considering giving him a banquet to which he was opposed. It is improbable that Browne should have had his followers called together to meet him for the purpose of considering the giving to him of a banquet against his will.

I say that the meeting was for the purpose of meeting Browne, and I will refer to some of the testimony. Mr. White has testified that Browne had said he would meet him in July on the fifteenth, and Mr. Wilson went down to that meeting, the testimony shows, and told the rest of the crowd who met there that Browne was ill with ptomaine poisoning, so that he had to come in his place. Here is a letter from Browne. I beg your careful consideration of it, for it is the letter which shows with great distinctness the relation of Browne to this meeting, regarding which the faked and manufactured explanation was gotten up the next year, and in which the testimony shows that bribes were paid.

Ottawa, Ill., *July 16, 1909.*

Honorable Charles A. White,
O'Fallon, Ill.

Friend Charlie: Thank you very much for your prompt recognition of my request in the Doyle matter. You have certainly been one of my good old friends since we have become acquainted. I feel sure that the friendship will last just as long as you and I do. I was awfully sorry that I was unable to be with you yesterday forenoon in St. Louis. I was taken very ill in Chicago Monday night with an attack of ptomaine poisoning and have had a pretty serious time of it. I did not dare to attempt the trip. I hope everything is all right with you and satisfactory and that you are happy and fairly prosperous. I hope before very long to be able to meet you either in St. Louis or Chicago and talk over old times. I think you and I have got one real good visit coming. Let me hear from you when you get time and the spirit moves you.

Very sincerely, your friend,
Lee O'Neil Browne.

I say that letter completely corroborates the testimony that the meeting of July fifteenth, in St. Louis, was a Lee O'Neil Browne meeting with his followers in southern Illinois, to which Wilson went as his locum tenens; and when you consider the fact that three of the men present at that meeting have sworn to the distribution of a fund, out of which they received $900 each, I beg you to consider this language of the letter which Browne writes to his friend White:

I hope everything is all right with you and satisfactory —

There is another fact, Mr. President, which corroborates most powerfully the testimony showing that there was money paid, a fund distributed at the July fifteenth meeting; and that is that two of the men who were there, when called before the grand jury of Cook County in an inquiry as to legislative corruption, testified under oath that they were not present at the meeting — perjured themselves to conceal the fact that they were there at all. They were indicted for that perjury. Why, if the meeting was an innocent one, if it was a meeting to talk about a banquet, if the testimony of these three men that there was a fund distributed there is false, and it was an innocent meeting, why should men be

willing to commit perjury in order to conceal the fact that they were there ?

Ah, no, Mr. President. The corruption in the legislature of Illinois which brought on the distribution of July fifteenth was practically admitted upon this hearing. When the first testimony about that meeting was produced the counsel for Mr. Lorimer objected to it because, he stated, it was testimony about what they called the " jack pot." Mr. President, the corruption in that legislature had continued so long, men's minds had become so accustomed to believing in it, men had become so callous to the iniquity of it, that they joked about it and nicknamed it as if it were a matter for jocular treatment. Several of the witnesses testified that they called it a " jack pot." The committee in their report say —

> If any money was disbursed by Wilson —

that is, at this July meeting —

> If any money was disbursed by Wilson, it is evident that it was from a fund which was neither raised nor expended to promote the election of Mr. Lorimer as a Senator nor to reward those who voted for him for that office. It was therefore no part of the duty of the sub-committee to inquire into either the origin of the fund or the purpose for which it was used.

That finding is in accordance with the contention of the counsel for Mr. Lorimer that there was corruption; that all of these followers of Mr. Browne in southern Illinois were called together on the fifteenth of July, and a corruption fund was divided among them.

The distinguished senior Senator from South Dakota [Mr. Gamble], a member of the sub-committee which took the testimony, with that frankness and intellectual integrity that always characterize him, stated to the Senate what is the indisputable and unquestionable fact relating to the tie that bound Browne and his followers together. The Senator from South Dakota said:

Mr. President, it has been my purpose to state the evidence given before the committee fairly as to bribery or corrupt practices as affecting the integrity of the votes cast for United States Senator. I am not here to give countenance to or to approve the proceedings, the record, or the methods pursued in the legislature of the state of Illinois. The evidence is uncontradicted that a system of corruption and malfeasance has been practiced for many years in the legislature of that state. It appears money has been coerced and received by members of the legislature for unlawful and unworthy purposes. Money appears to have been demanded and received for the promotion or defeat of legislation, irrespective of its merits, and the funds so secured have been held and retained and the sum distributed to members of the legislature after adjournment.

Again, the Senator from South Dakota said:

The evidence, it appears to me, was overwhelming from many witnesses upon the stand, both directly and indirectly, that the matter of the " jack pot " had been in existence and in operation for some years. It appears to have been reduced in its operation practically to a system. I had never heard or learned of its being inaugurated elsewhere to the extent that funds raised and paid to effect legislation irrespective of its merits were held and pooled, and later distributed after the close of the legislative session.

And further, in answer to an inquiry, he said:

Because, as I have said, the existence of a " jack pot " fund was testified to by many witnesses, and very early in the hearing its existence was practically admitted, as far as it could be, by the respective counsel upon either side in the case.

Mr. President, it appears, upon uncontradicted and indisputable testimony in this case, that the collector, the distributer, the leader in this corruption of the legislature of Illinois was Lee O'Neil Browne. He was the man in whom centered agreements for the payment and who held the funds paid; and the vote for which the payments were made followed the bellwether, who voted as he knew Browne wished him to vote, right or wrong. Browne was the distributer, and the ptomaine poisoning which, to his great regret, prevented him from meeting his followers in southern Illinois on the fifteenth of July, was all that led to Wilson's distributing the money instead of Browne's distributing it himself. This

was the agent in whose hands was placed the securing the votes for Mr. Lorimer.

I fully agree with the expressions that we have had as to the character of Mr. White, who made the original charges. I do not know anything baser than his conduct. His character was such that it seems quite impossible that any man should be mistaken about it. I would not believe him, uncorroborated. But I beg the Senate's attention to the fact that this case is full of testimony to the effect that Lee O'Neil Browne was an intimate, warm, personal friend and boon companion of White; and one of the things which goes to blacken the character of White is his intimacy with the arch corruptionist of the Illinois legislature. I have read you one letter from Browne to White, in which he accounts for his failure to attend the meeting of July fifteenth. Let me read you another:

OTTAWA, ILL., *September 9, 1909.*

FRIEND CHARLES: Just got your letter. Am awfully sorry for you, old pal, because I know how true a good fellow and gentleman you are. Your fault, old pal, is in trying to go too —— fast. You must cut it out for awhile, old boy. I'll do all I can to land you in a job, but do not yet know when Lorimer will be able to do anything, or, rather, when he will do anything. But I'll do all I can, Charlie. Am pretty hard up myself after the vacation we all had, but have managed to scratch out a fifty for you. Hope it will do some good, anyway. I am down at the " grind " again, working like a slave. It's sure h–l after the " music and flowers " we had for a time this summer. But when a thing has got to be done, I can always shut my teeth and go to it. It's the only way. It's hell, but that's the price one pays for most of the pleasure of life. I always did, at least. Good-by, old man, and God bless you. Wish I could do more for you.

Your friend,

LEE O'NEIL BROWNE.

Mr. President, White and Link and Beckemeyer all have sworn that on the twenty-first day of June Mr. Browne paid to them $1,000 each, and two of them testify to that payment being pursuant to promises made by Browne to them before the election of Lorimer. Are we to reject that testimony?

Upon what ground are we to reject it? It is opposed by the testimony of Lee O'Neil Browne, who certainly upon this record stands on no higher plane than White, his intimate friend. Upon what ground are we to reject the testimony of these three witnesses and accept the testimony of Lee O'Neil Browne, which we already know to be false, because he denies, denies under oath, denies, as we know, falsely, the disposition of the jack pot. The division of July fifteenth he denies equally with the division of June twenty-first. We know his oath is false, and are we to take it, proved to be false as to one of those two distributions, and assume it to be true as to the other?

Mr. President, the best test as to the credibility of human testimony is its conformity to the known facts and the accepted rules of action of human nature. The relation between Lee O'Neil Browne and his followers is proved to be the relation of corruption. The leadership of Lee O'Neil Browne over his followers, by which he brought them to vote for this candidate of an opposite political faith, is shown, beyond the possibility of dispute, to be a leadership founded upon the inveterate custom of following his vote and dividing the proceeds of the bribery of which he was the collector and distributer.

Put that fact, the great salient fact of the case, by the side of the testimony of these unimpeached witnesses, showing that methods of bribery regarding Lorimer were being followed; the testimony of Groves and of Terrill, and of Meyers, who was approached with a suggestion of a bribe by Browne himself — put those together, those specific facts, and this general relation of Browne to his followers, and what are the probabilities? Will any man in his inner belief resist the conclusion that Browne exercised his control over his followers for Lorimer just as he exercised it in ordinary matters of legislation? Can any man resist that belief?

Mr. President, we cannot make a finding based solely upon a belief of that kind. We may have a moral certainty, but we cannot vacate a seat in the Senate on a moral certainty. But when there is a moral certainty derived from a course of conduct and the character of men; when there is a moral certainty that there has been corruption, and there is also specific and direct evidence of the corruption, we are not at liberty to reject that evidence. There can be no corroboration of human testimony stronger and more compelling than what we know of the character of Browne, of the business he was engaged in, of the method and source of his control over his followers — I say there can be no stronger corroboration than that knowledge, to the testimony of Meyer and Groves and Terrill and to the testimony to specific acts of accomplished bribery by White and Link and Beckemeyer.

There is one other circumstance which is a little aside from the main current of this sewer which we have been considering, and that is the bribery of Holstlaw. Mr. Holstlaw was, prior to the meeting of the assembly of Illinois of 1909, in which he was a senator, a reputable man, of good standing in the community in which he lived. He was a small banker in the town of Iuka, Ill. He testifies that Mr. Broderick, another Democratic senator in the legislature of Illinois, who was a saloon keeper in Chicago, spoke to him about voting for Lorimer, and said to him that there was $2,500 in it for him if he did.

He testifies that about the sixteenth of June, or just before the sixteenth of June, he was sent for by Mr. Broderick to come to his place of business in Chicago. He testifies that was either by letter or telegram, and that he went there; that Mr. Broderick handed him $2,500 in a package and he took it and went away, Broderick at the same time telling him there would be more for him later.

He went away, and he went to the State Bank of Chicago and deposited this $2,500 in the name of his bank, the Holstlaw Bank, of Iuka. The cashier of the State Bank of Chicago was called, and he testified that Holstlaw did on that sixteenth day of June deposit this $2,500 in bills to the credit of the Holstlaw Bank. Broderick's testimony is the only testimony in opposition to this evidence given by Holstlaw and by the bank cashier, the bank clerk. Mr. Broderick admitted that Holstlaw was at his saloon on that day. It is admitted that Holstlaw never was there before. It is admitted that he never was there again except once when soon afterwards, the following month, Broderick sent for him again and he came in and Broderick gave him $700. He never was there before. He never was there again. He had no business there. He had no business there at all, unless it was to receive this money. No occasion for his going there for the first and last time in his life is suggested unless it was that.

Mr. Broderick was called as a witness. He denied that he paid Holstlaw any money on either occasion; but when an attempt was made to cross-examine him, the moment that the questions pointed to any fact in which he might be detected in falsehood, he refused to answer, upon the ground that he would be compelled to give testimony against himself —

Mr. GAMBLE. Mr. President —

The VICE-PRESIDENT. Does the Senator from New York yield to the Senator from South Dakota ?

Mr. ROOT. Certainly.

Mr. GAMBLE. Would it not be fair to state that the Broderick referred to was under indictment at the time ?

Mr. ROOT. Oh, yes.

Mr. GAMBLE. And claimed his privilege on that ground ?

Mr. ROOT. Yes; he was. He was under indictment, but he was ready to testify far enough to deny, and he did not claim his privilege until counsel put his finger on some

point where it was possible to contradict him if he swore falsely.

Q. Mr. Broderick, did you ever have any occasion to write to Mr. D. W. Holstlaw in the month of August to call upon you ? — A. I refuse to answer on the same ground as I said before.

Q. On what ground ? — A. On the same ground as I stated before.

Q. On what ground do you refer to ? — A. That I might be compelled to give testimony against myself.

Q. Mr. Broderick, when did Mr. Holstlaw come to see you ? — A. Well, I don't exactly remember the date, but he was in my place when I came in there.

Senator BURROWS. Witness, will you speak a little louder ?

The WITNESS. All right.

Mr. AUSTRIAN. Had he come in response to any invitation from you to him ? — A. I refuse to answer.

Q. Had you any business with Holstlaw which would compel you to invite him or ask him to call upon you ? — A. Repeat that again.

Q. Strike it out. Did you have any business with him which would necessitate his calling on you in the month of June or July ? — A. No, sir.

Q. 1909 ? — A. No, sir.

Q. No business whatsoever ? — A. No, sir.

Q. If he came to see you during the month of June or July, 1909, did he come on his own volition or at your request ?

Judge HANECY. That is objected to, Mr. Chairman. — A. I refuse to answer; that is the same question all the time.

Then he is asked whether Mr. Holstlaw talked with anybody else while he was in the saloon, and he refuses to answer upon the ground that it would be compelling him to give testimony against himself. That is the sole contradiction. There is the testimony of Holstlaw, a witness unimpeached but for these transactions; there is the testimony of the chief clerk of the State Bank of Chicago to the deposit of the money, and there is the refusal of Broderick to subject himself to cross-examination upon the denial that he made as to the giving of the money to Holstlaw.

Mr. President, there was a way perfectly plain to ascertain whether the testimony of Holstlaw as to the fact that the money he deposited in the State Bank of Chicago on that day

came from Broderick was true or not. There was a perfectly plain way either to contradict it or to corroborate it. The deposit was to the credit of the Holstlaw Bank, of which he was the owner.

Mr. President, banks keep books. They have to do it. They cannot do their business without it. Somewhere or other in the books of that bank there must have appeared the source of the $2,500 which a year before this investigation had been deposited with the State Bank of Chicago to the credit of the Holstlaw Bank. They could not have kept the books of that bank without putting that entry in there as coming from somewhere, and if they put in where it came from and indicated some other source that would have led directly to an inquiry at the source from which the books said it came, and if the entry was false to proof of its falsity.

But, with that plain means of contradicting the statement if it was false, they left untouched the testimony of Holstlaw, corroborated as it is, but ineffectively contradicted as it is by this half-way witness. Corresponding to the admitted fact as it does, it stands with a strength of probative effect that no court in Christendom would disregard, and which requires of the Senate to find that one vote at least, cast on the twenty-sixth of May for Mr. Lorimer by Senator Holstlaw, was procured by bribery, and by bribery on the part of the late caster of another vote, Senator Broderick.

This, Mr. President, is another item of corroboration of the testimony to which I have already referred, showing the way in which the votes for Mr. Lorimer were secured in the assembly by Mr. Browne.

Mr. President, what is the effect of these facts plainly established, the fact that four of the votes cast were cast under the influence of money paid, and the fact that the money was paid by three others of those who cast the votes? We are not engaged in a technical proceeding, sir. We are

engaged in a proceeding where we are bound, if there is sufficient evidence, to proceed in accordance with what we really know to be the truth.

I say again, however much we may believe it to be true that there is corruption, we cannot act upon it unless there is evidence, but if we do on this record really believe it and there is evidence, we are bound to act upon the evidence.

Mr. President, I put it to the conscience of every Senator who is good enough to listen to my words whether he really believes that if Browne and Broderick and Wilson bribed White and Link and Beckemeyer and Holstlaw to vote for Lorimer they themselves were pure in motives and free from the corruption which they were trying to bring about. How can anybody for a moment reconcile it with his knowledge of human nature that that was the case?

Yet we cannot act unless there is evidence. But there is evidence. It appears first by the testimony of Mr. Meyers and then by the testimony of all these others that Mr. Browne was pursuing the same methods regarding the Lorimer election that it is proved he pursued in regard to ordinary legislative corruption.

It appears by the testimony of Mr. White, testimony that must be accepted, because it is corroborated by this great array of indisputable facts, that on the twenty-first of June, when Mr. Browne paid to him the thousand dollars and said, "Here is your Lorimer money", he had a blue belt about his waist in which he carried a large sum of money, and that when White referred to it, Browne said that the day before he had the money in his pocket-book, and a man jostled against him in the street and looked as if he was angry with him. He said that if he had known he had jostled up against $30,000 he would not have been so anxious to look angry.

Mr. President, I say we are bound to accept that testimony, because it accords with what every one of us knows to

be true. Every one of us knows that with bribery attempted upon seven independent members of a legislature, effective as to four, failing as to three, but evidence of it produced, never in this world did it happen, or could it happen, that there were not others.

So difficult is it to secure evidence of this kind of crime, so almost insuperable are the obstacles to confession and to testimony, that universal experience has established to the knowledge of us all that but a trifling, occasional, incidental portion of the corruption that exists, wherever it exists at all, is ever brought to light. So well is this understood that in England, in order that corruption might not continue to do its demoralizing work in their body politic, they have made by law the proof of the bribery of one voter fatal to an election, and they have made by law the oral admission, not under oath, of a voter that his vote was bought evidence of the truth of the admission.

The difficulties in the way of making proof where, in the vast majority of cases, both parties are guilty and neither can give evidence without stamping himself with infamy are so great that we are bound to act upon the universal knowledge that the facts brought out here in evidence must have been accompanied by other similar facts; and here you have proof, here you have legal proof. I say, Mr. President, no Senator is at liberty to reject that proof which corresponds with his own belief.

It appears, also, by Mr. White's testimony that Mr. Browne stated at the time, as part of the *res gestæ*, that he considered himself entitled to a larger share of the corruption fund than the other for his risk. Here is what he said:

> He told me that he ought to have more than the other members, but he could not tell . . . "I can't tell some of the fellows that, but I ought to have more than some of the other members, because I run greater chances and take more risks."

I say you are not at liberty to reject that testimony. You are not at liberty, having lawful evidence to rest a finding upon, to reject it and proceed upon the assumption that every one of us will know to be false, that this professional corruptionist, this collector and disburser of bribes, this leader in the system of organized bribery, who has disgraced the state of Illinois for many years, was himself pure. Without evidence we cannot give effect to what we know and believe, but with evidence we cannot reject it.

It further appears by the testimony of Mr. White that Clark, one of the members of the southern Illinois crowd, as Browne calls them, was present at the meeting of June twenty-first when the Lorimer money was divided, and at the meeting of July fifteenth, when the jack-pot money was divided, but who denied it, told White then, at a time near enough to the events to be a part of the *res gestæ*, that he was dissatisfied with the share he had received, and told him that Link, one of the other men who was bribed to vote for Lorimer, was ready to vote for $500, but that upon his persuasion Link had held off, and they each had got $1,000.

Mr. President, on the twenty-eighth of last May the Senator from Illinois [Mr. Lorimer] vouched for Lee O'Neil Browne as a strong, high-minded, God-fearing, honorable man, who believed the Bible from cover to cover. I am glad that this record permits us to believe that Mr. Lorimer was mistaken in his estimate of Mr. Browne.

But, Mr. President, he made Browne his agent. It was through Browne and by Browne's practices that the vote was secured which made Mr. Lorimer a Senator of the United States, and it is doing him no injustice to hold him not to that criminal accountability which requires knowledge and intent, but to civil responsibility for the consequences that flow from the action of his agent.

Mr. President, we here are not a court in the discharge of this high function; we are more than a court. There exists no power in any government short of an amendment of the Constitution of the United States to limit or control the evidence we shall receive or the grounds upon which we shall act in judging the qualification and election of a member. The sole limit is the limit imposed by our own sense of what is just and right and for the public weal. No strict rules of evidence control us, no statutes declaring what shall or shall not constitute a good election. We are not a board of canvassers counting votes; we are a body which Congress itself cannot control, protecting the integrity, the purity, and the efficiency of this great representative body, in many respects the most powerful body under representative government in the world. We are charged with that duty, and our own consciences and sense of justice must determine the action we take in the performance of the duty. The question for us to determine is whether, upon the whole, taking all this testimony together, the election of William Lorimer was brought about by corrupt practices.

It was held by a committee of the Senate in the Caldwell case in 1873 that the payment of money to secure the withdrawal of a rival candidate for the Senate, through its indirect influence upon the subsequent voting, was sufficient to invalidate an election. The judgment of the Senate upon that proposition was prevented by the resignation of Mr. Caldwell. It was held by a committee of the Senate in the Payne case that the payment of money to the members of a caucus, by reason of its indirect effect upon the votes subsequently cast, when no one was bought to vote in the election, was sufficient to invalidate an election.

It appears to have been held in the Clark case by a committee of the Senate that when a number of votes were shown to have been procured corruptly, sufficient if they had been

cast for another candidate to have changed the majority, that that would invalidate the election. The judgment of the Senate was prevented in that case also by the resignation of the candidate.

I make two distinct propositions as to the legal effect of this testimony. The first is that the deduction of the seven votes — I should call them in view of the Clark testimony eight votes — the deduction of those votes from the one hundred and eight votes cast for Mr. Lorimer, leaving Mr. Lorimer with less than a majority of all the votes of the joint assembly, invalidates his election.

The Senator from Texas [Mr. Bailey], who knows very well my opinion of his intellectual power, for I have not hesitated to express it, with the accuracy of mental process that always characterizes him, put a question the other day on the floor whether it was possible to sustain the proposition that you can deduct the seven votes from the Lorimer vote, leaving one hundred and one, and not deduct them from the total vote cast. I answer that it is perfectly immaterial how that question is answered. You will perceive that if you stop there, as the Senator from Texas does, deducting the seven votes from the one hundred and eight would leave one hundred and one votes for Mr. Lorimer; deducting the seven votes from the two hundred and two would leave one hundred and ninety-five votes cast; and the one hundred and one still remaining of votes not proved to have been bought for Mr. Lorimer would be a majority of one hundred and ninety-five. That is the way it works out. There the Senator from Texas stops; but I must insist that he go with me a step further. Why does he deduct from the two hundred and two votes that were in fact cast these seven votes proved to have been corrupted ? Because they are corrupted. Because they are corrupted they are deducted from Mr. Lorimer's column; and for the same reason they are deducted from the total vote.

What is it that makes Mr. Lorimer's one hundred and one good votes a majority ? The deduction of these seven from the total vote, and that deduction leaves Mr. Lorimer one hundred and one votes, a majority brought about by bribery.

What matters it whether the money that Browne distributed was used to swell the Lorimer vote above one hundred and one, so that he would have a majority, or was used to reduce the total vote so that one hundred and one would be a majority ? Either way that the result is produced, it is produced by corruption. That cannot stand; or if it does stand, the Senate cannot stand; or if the Senate does stand with its members holding their places by such a tenure, the Government of the United States cannot stand.

I make another proposition. It is that, without counting additions and subtractions of the seven specific votes, we have in this testimony such general comprehensive and indisputable proof as to the character of the entire control by Lee O'Neil Browne over the thirty members of his band of robbers, whom he led to vote for Lorimer, that we are bound to reject an election based upon all of them.

Upon this record there is not one vote of the thirty that is entitled to be considered a pure and honest vote. Upon this record the whole movement of the corrupt crowd — the confessedly corrupt and venal crowd — that followed Lorimer's agent Browne to the vote, ought to be treated as no valid basis for a seat in this Senate.

Mr. President, it is an ungracious task to urge such considerations; it is a disagreeable duty for Senators to listen; but for many years the people of the United States have been growing in an uneasy conviction that seats in the Senate of the United States have been obtained by bribery, and that, owing to the difficulties of securing proof, the natural unwillingness of colleagues to believe ill of their fellows, owing to whatever cause it may be, attempts to bring home to a

member charged the consequences of what the people of the country have believed to be corrupt practices uniformly fail.

It is this belief, Mr. President, that has reduced the honor paid to the Senate of the United States. It is this belief, sometimes based upon the mistaken observation of the people of the country whom we represent, that has been sapping the confidence of the people of the country in the Senate of the United States. This belief is one of the great considerations underlying the widespread demand for a change in the method of choosing Senators of the United States. This belief is one of the great considerations which are warping our people away from their confidence in the representative Government established by our fathers. It is one of the things that is making them distrust the possibility of pure and honest representative government, and it is bringing about long strides toward a change in our system of government; it is carrying great sections of our country away from the old methods of the Constitution.

If we would preserve the Government of the fathers, if we would preserve the honor and integrity of the Senate, if we would do our full duty to our country under our oaths, we are not at liberty to reject the testimony in this case, which shows this seat to be filled here as the result of corruption. Hard it is; but as we have had fathers who have made sacrifices for our land, as we have children to whom we hope to hand down a government of peace and justice and liberty, it rests with the Senate of the United States to do its duty now; and, hard and unpleasant as it may be, purge itself of the results of this foul conspiracy against the integrity and purity of our Government.

THE BANKING AND CURRENCY BILL

ADDRESS IN THE SENATE OF THE UNITED STATES DECEMBER 13, 1913

At the second session of the Sixty-third Congress there was passed an act "to provide for the establishment of federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes." This act was approved December 23, 1913. While it was under consideration in the Senate, Mr. Root addressed himself at length to an amendment to section 16 of the bill, which he had previously offered, and which was as follows:

In section 16 (Owen print of December first) strike out lines twenty-four and twenty-five, on page 37, and lines one to nine, inclusive, on page 38, and insert in lieu thereof the following:

The Federal reserve banks may from time to time, with the consent and approval of the Federal reserve board, issue notes to meet business requirements.

The said notes shall be obligations of the Federal reserve bank issuing the same and shall be receivable for all taxes, customs, and other public dues.

They shall be redeemable in gold on demand at the Treasury Department of the United States in the city of Washington, D. C., or in gold or lawful money at the bank of issue.

All note issues of the Federal reserve banks shall at all times be covered by legal reserves to the extent required by this section and by notes or bills of exchange arising out of commercial transactions, or obligations of the United States.

All demand liabilities, including deposits and note issues, of the Federal reserve banks shall be covered to the extent of fifty per cent by a reserve of gold or other money of the United States which the national banks are now authorized to hold as a part of their legal reserve: *Provided*, That whenever and so long as such reserve shall fall and remain below fifty per cent the Federal reserve bank shall pay a special tax upon the deficiency of reserve at a rate increasing in proportion to such deficiency, as follows: For each two and one-half per cent or fraction thereof that the reserve falls below fifty per cent a tax shall be levied of one and one-half per cent: *Provided further*, That no additional circulating notes shall be issued whenever and so long as the amount of reserve held by any Federal reserve bank falls below thirty-three and one-third per cent of its outstanding notes.

Any notes of the Federal reserve banks in circulation at any time in excess of an aggregate of $900,000,000 for all of said banks, which are not covered by an equal amount of lawful money, gold bullion, or foreign gold coin, held by said banks shall pay a special tax at the rate of one and one-half per cent per annum, and any notes in excess of an aggregate of $1,200,000,000 for all said banks, not so covered, shall pay a special tax at the rate of five per cent per

annum: *Provided*, That in computing said amounts of $900,000,000 and of $1,200,000,000 the aggregate amount of any national bank notes then outstanding shall be included.

The notes issued by the respective Federal reserve banks shall constitute a first lien upon all the assets of the bank issuing the same. It shall be the duty of the Federal reserve board to require the Federal reserve banks to maintain at all times the parity of value of the notes issued by said banks with the standard established by the first section of the act of March 14, 1900, entitled "An act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes."

This amendment was intended to safeguard the country against an inflation of the currency, which Mr. Root deemed likely to occur under the provisions of the bill as it then stood, and which he proposed to prevent by means of a special tax, whenever and as long as a legal reserve of fifty per cent of gold or other money of the United States in any reserve bank should fall and remain below that percentage, such tax to be progressive in character. Other safeguards were provided in Mr. Root's amendment.

Several replies were made to Mr. Root's speech, and he himself made an elaborate answer to these replies. When Mr. Root's amendment was brought to a vote, it was defeated: yeas 22, nays 49.

It will be observed, however, that the bill before the Senate when Mr. Root spoke provided for a gold reserve of thirty-three and one-third per cent, as in the House bill. Mr. Root insisted that this gold reserve should be increased to fifty per cent, and the bill as finally passed raised the reserve to forty per cent, which the House conferees accepted.

It will also be observed that Mr. Root's proposition to impose a tax or penalty for deficient reserves, which proposition, although it had been in the House bill, was not in the draft of the Senate bill at the time Mr. Root spoke and was opposed by the Chairman of the Senate Committee, was restored to the bill as it finally passed.

BEFORE proceeding to point out the specific effect of the proposed amendment which has just been read, I wish to repeat an acknowledgment which I have already made in the Senate of grateful appreciation for the devoted and sincere labors of the members of the Senate Committee on Banking and Currency. This acknowledgment applies to all the members of that committee, however their conclusions differ, as represented by the different forms of the bill which are before us. I wish also to say that I think this bill has in it many very excellent and useful features which will be beneficial to the commerce of our country, and which ought to be enacted.

I regret that the circumstances under which the measure comes before the Senate are not more favorable to real discussion. I am not one of those who denounce caucuses and attempts to secure united party action. Under my own conception of a government by political parties, membership in a party involves certain obligations to attempt agreement upon that united party action which is necessary to discharge party responsibilities. I do not think that the declaration of affiliation with a political party should be regarded as merely a means of obtaining office, to be forgotten after office is obtained. I think that when by declaring himself a member of a political party a man has secured an election to office by his fellow-citizens, he has assumed toward them an obligation to seek to do his part toward discharging the responsibility of his party in putting into effect the policies which it declares.

So, sir, I do not regard with the animosity and great disfavor which have been expressed with great sincerity by some of my colleagues the attempt of the Democratic party to secure effective action along the line of their party declarations and principles.

But, sir, I think it is very unfortunate that the Democrats of the Senate have taken their caucus action in advance of discussion on this bill in the Senate rather than after discussion. I think it would have been much better if the bill had been reported to the Senate so that we all could have discussed it, so that differing opinions from different points of view could have been expressed, and then after the benefit of that discussion the dominant party had assembled and determined its course of action. There would then have been more zest and life and sense of opportunity on the part of the members of the minority in discussing the bill.

Certainly, sir, one of the chief advantages in our system of representative government is that it does give to those who hold the power by virtue of being in the majority the benefit

of the differing points of view of the minority. Discussion is most valuable when it involves an expression of those who differ, and not when it is a mere presentation of the views of those who agree. As it is, all of us on this side of the chamber labor under the great discouragement of feeling that whatever we may say the fate of the bill and of every part of the bill is already determined.

While there is a little hope, it is rather slight, because, as the Senator from Iowa [Mr. Cummins] pointed out yesterday, the burden is not to produce an effect upon individual members of the majority, but it is to convince a majority of the majority that they ought to reverse the conclusions which have already been reached — a very difficult thing to do. I am grateful to my friends upon the other side for permitting me to address myself to a task which is not, at least theoretically, impossible, however practically improbable its accomplishment may be.

The point toward which the amendment just read, is directed is the sixteenth section of the currency bill. Let me read the provision which I ask to have stricken out, under the head of " Note issues ":

> Sec. 16. Federal reserve notes, to be issued at the discretion of the Federal reserve board for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, in the city of Washington, D. C., or in gold or lawful money at any Federal reserve bank.

You will perceive that that provision contains in its terms no limit whatever upon the quantity of notes that may be issued:

> Federal reserve notes, to be issued at the discretion of the Federal reserve board for the purpose of making advances to Federal reserve banks. . . . The said notes shall be obligations of the United States.

That, sir, is to my view a plain, simple enlargement of the national currency of the United States. It is authority for the increase, practically, of what we call greenbacks. The notes will be obligations of the Government of the United States pure and simple. They are not credits of anybody else; they are credits of the Government of the United States. While technically they are not money but are promises of the United States to pay, I shall speak of them as money, just as we speak of our greenbacks as money, because in the ordinary colloquial use of words that description is best understood.

Let me state now, before going on to consider further incidents to this issue of Government currency, the present position of our currency, because that is a necessary background to a consideration of the effect and propriety and usefulness of issuing more Government paper.

According to the report of the Comptroller of the Currency for 1913, the total stock of money in the United States on June 30, 1913, was as follows:

In the entire United States there were $3,720,000,000. Of that there were in the Treasury of the United States, held as assets against currency, $356,300,000, leaving in circulation $3,363,700,000.

Of that there were in the banks of the United States, including national banks, state banks, and trust companies, $1,552,300,000, leaving out of the banks and in circulation among the people, that is, in real circulation, $1,811,400,000.

On the basis of this currency and by the use of credits representing currency there were at the same time individual deposits in the banks of the United States of all the classes that I have enumerated, $17,024,000,000, the deposits being approximately nine to ten times the amount of actual money in circulation, and from ten to eleven times the amount of the actual money in the banks, this great excess of deposits being

brought about by the deposit of credits, the same amount of money serving for numerous successive credits.

This money appears by the report of the Secretary of the Treasury for 1913 to have been of the kinds I shall state. Let me say that the figures of the comptroller were for June 30, 1913, while the figures of the Secretary of the Treasury are for November 1, 1913. They will not tally exactly, but there are only the ordinary variations from day to day, and the differences are so slight that it is of no consequence for our purposes.

This money was of the following description: Of gold coin, $614,478,201; of standard silver dollars, $74,012,152; of subsidiary silver, $160,486,188; of gold certificates, $1,021,451,879; of silver certificates, $480,079,731; of Treasury notes of 1890, $2,583,874; of United States notes, that is, greenbacks, $341,401,413; and of national-bank notes, $722,615,240; footing up on November 1, 1913, $3,417,109,678.

In this enumeration of the kinds of money the Government appears as having issued, not including gold certificates, which really represent gold deposits — which are a trust fund against the certificates — the Government appears as having issued its paper, practically its promises to pay, of greenbacks, $341,401,413; of Treasury notes of 1890, $2,583,874; and of silver certificates against the silver on deposit, $480,079,731, making a total of $824,064,118 of Government obligations. Against that the Government had of gold reserves $150,000,000 and of silver deposited, upon which it had issued certificates, which the Government is under obligation to keep on a parity with gold, and which is, speaking roughly, worth about one-half of gold, $480,079,739. I treat one-half of that silver as being security or reserve against the silver certificates; a little more or less is of no consequence. So that, as against this $824,064,118 of its demand obligations, the Government has in reserve in gold

and silver value $391,331,000. It is now proposed to increase that amount of $824,064,118 of demand obligations of the Government by the issue of further Government obligations under the provisions of section 16, which I have read. The section proceeds to provide that the Government, in issuing these notes and advancing them to the reserve banks, shall take security from the banks, and that the banks shall hold in their vaults as applicable to making good to the Government the notes which have been issued to them a reserve. The reserve is to be thirty-five per cent; and it is required that at least thirty-three and one-third per cent of that amount of notes issued to the banks shall be based on gold.

The bank is also to furnish to the Government, through a Federal reserve agent representing the Government, commercial paper to the amount of the notes. Those two kinds of security are provided for; a security which, if the Government were loaning money to you or to me in a specific transaction, I should say should be deemed adequate security, and manifestly the members of the committee have regarded the provision as furnishing adequate security to the Government in respect of the particular transaction considered by itself. It is not, however, consideration of the transaction by itself as a simple matter of the loan of money or of credits upon securities to which I wish to invite your attention. I think that the relation of the series of transactions, of the possibilities of the powers vested in this central reserve board, and the effect of the exercise of that power as a whole from time to time, day after day, month after month, and year after year, upon our financial system, upon the commerce of the country, is the true subject for our consideration rather than the narrow question whether in a particular transaction the security which the Government gets for its loan is adequate.

Mr. President, it is desirable to get some idea as to what limitations upon this power to issue Government obligations,

that by its own terms has no limit, may be created by the requirement that the bank shall retain security in the way of reserves, because that will give some idea of the extent to which the power may be exercised.

In the first place, the obligation that the bank shall hold a reserve will tend to operate to some extent as a limitation, because, if the banks do not hold a reserve, the Federal reserve board would not be justified in advancing further notes to them, and would be bound perhaps, then, to reduce the number they already have. Here is the provision of the bill:

> Every Federal reserve bank shall maintain reserves in gold or lawful money of not less than thirty-five per cent against its deposits and its Federal reserve notes in actual circulation, but the amount of gold in the Federal reserve bank, together with the amount deposited by it with the Treasury, shall be at least equal to thirty-three and one-third per cent of the Federal reserve notes issued to said bank and in actual circulation and not offset by gold or lawful money deposited with the Federal reserve agent. The Federal reserve board may notify any Federal reserve bank whose lawful reserve shall be below the amount required to be maintained to make good such reserve; and if such bank shall fail for thirty days thereafter so to make good its lawful reserve, the Federal reserve board may suspend and take possession of such reserve bank and administer the same during the period of suspension.

Assuming that that reserve is to be retained, the Senator from Virginia [Mr. Swanson] gave us some figures which I shall adopt. From my knowledge of the Senator's accuracy, I presume they are correct, but I have not undertaken to verify them by my own calculations, because minor differences are of no particular consequence. The figures, as the Senator stated them, are that under the mandatory provisions of the bill the regional reserve banks would have total resources of about $636,000,000. Those include capital, Government deposits, and the reserve deposits of member banks. That is under the mandatory provision; and, as I think the Senator remarked in his speech, that is liable to be

increased by voluntary accessions of state banks which may come in under permission of the statute, but the minimum may be taken to be $636,000,000. The Senator stated the quantity of Government notes which might be issued without any violation of authority or duty because of the reserve requirement, to the banks having that amount of assets — $636,000,000 — to be $1,817,000,000; which I think to be substantially correct.

Now, sir, let us turn to the requirement that there shall be commercial paper furnished as security. We have found that upon this general authority, this unlimited authority, there is no restriction placed by the reserve provisions, except the power of the bank to get gold for the thirty-three and one-third per cent of its reserve. If it can get that, the amount to be issued may run from $1,800,000,000 up. The terms of the bill regarding the security to the Government I will read, as follows:

> Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes and bills accepted for rediscount under the provisions of section 13 of this act.

If we turn to section 13 of the act, we find a description of the bills and notes which may be tendered as collateral security. The description is important, because, while I do not quarrel with it as a proper description of the kind of commercial paper which may properly enter into banking transactions as a basis for banking credits, we ought to observe that the scope of the paper described is such that there is practically no business enterprise possible in our country that cannot be financed by the use of such paper. I refer to that because I am now trying to ascertain what limitations

upon the general power to enlarge the demand obligations of the United States can be found in the character of the paper that must be offered as security. Here is the description:

Any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal reserve board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this act. Nothing in this act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days.

There is in this description of the notes and bills — the paper which may constitute the security to be offered for the loan of the Government notes — no limitation whatever by a reference, either to the capital of the bank discounting or to the deposits of the bank discounting or to any other fixed standard. There is no limit that I can find in the bill to the quantity of paper of the kind described that any bank may take, except the bank's ability to get the money to pay for the paper. I have looked carefully for it, and I have asked a number of my friends if they could find it anywhere, and they have said they could not.

There is no limitation in this bill. We as the lawmaking power impose no limitations. We do confer upon the Federal reserve board a power and discretion, and as to the efficacy of that authority on their part I shall speak in due course. The section proceeds:

Any Federal reserve bank may discount acceptances which are based on the importation or exportation or domestic shipment of goods and

which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

We put into the bill a limitation upon that kind of paper, but we put in no limitation upon paper of the general description I have already read.

Then there is another limitation:

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per cent of the unimpaired capital and surplus of said bank —

that is, we put a very proper limitation upon favors to single individuals or corporations —

but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

From which it is to be inferred that the discount of notes and bills of the kind described is expected, though they be not drawn in good faith against actually existing values; and against those which are not drawn against actually existing values the limitation of ten per cent to one person applies.

Mr. President, one of the causes of complaint of our present financial system has been that during the dull season, when money is not needed for crop moving or other great business movements, it tends to flow to the city of New York, where it goes first into the reserve deposits of the country banks at two per cent interest, and next goes into deposits outside of the reserves and is loaned on call upon collateral security and is used in speculation in the stock market and used for the promotion of new enterprises. It has long been one of the great sources of trouble in the autumn, when money is needed in the country to move the crops, that the money that has flowed to New York when it was not needed in the country has been taken by the New York banks at interest, and the banks, having to make something from it in order to

pay that interest, have been driven to taking security which was not of the highest quality; that is, they have been driven to putting the money out upon collateral consisting of securities of new enterprises the value of which depended upon their being completed and successful. The real trouble about getting in that money in the autumn for use in the country has been, not the trouble of getting in money that was loaned out on good securities of established concerns, established corporations, railroads, and industrials, but the difficulty of getting in money that had been loaned on the securities of new enterprises all over the country that depended for their means of payment upon the success of the enterprises.

I undertake to say that there is no new enterprise conceivable in this country, that no one of us has known in the past decade a new enterprise, which could not be financed by bills and notes coming within the description of the bill I have read. It is as easy to turn from a collateral note, such as is used now in absorbing the great mass of money that flows to New York every year and is loaned out, and turn to bills and notes coming within this description as it is to buy a blank from a stationer. Observe, sir, that the same rule of action, the same principle, which gives us seventeen billions of deposits in the banks of the country with less than three and a half billions of money in and out of the banks, with only one billion and a half of money in the banks, the same principle which gives us deposits more than ten times the amount of money that is in the banks, will be applicable in the making of the bills and notes that can be brought in as security for these Government notes; that is to say, merchandise in its passage from the point of production to the point of consumption may be drawn against by successive holders in good faith, and each transfer may be made the basis of a bill upon which discount may be obtained, upon which a Government note can be issued.

So, sir, I think we find no recourse by way of limitation here in anything that we impose by our bill against as vast an enlargement of the demand obligations of the United States as the reserves of the banks will permit. When we consider the more than twenty billions of internal trade; when we consider the more than three and a half billions of foreign trade; when we consider the immense opportunities for enterprise afforded by the great and not half-opened or exploited regions of the South and West; when we consider the energy and optimism and sanguine spirit of our people, we must face the probability, the certainty, that this offer of practically unlimited funds from Uncle Sam to all his people will result in an activity of enterprise that will absorb the maximum which the required reserves permit and require the extreme exercise of the authority of the reserve board to issue these obligations.

Now let me return to the fundamental propositions upon which we began to address ourselves to this subject, and call attention to the fact that one of those propositions was that we should have an elastic currency.

What is an elastic currency? We all agree that it is a currency which expands when more money is needed and contracts when less money is needed. It is important not merely that the currency shall expand when money is needed, but that it shall contract when money is not needed, for to an industrial and commercial country a redundant currency is the source of manifold evils, some of which I shall presently point out.

At present I observe that this is in no sense a provision for an elastic currency. It does not provide an elastic currency. It provides an expansive currency, but not an elastic one. It provides a currency which may be increased, always increased, but not a currency for which the bill contains any provision compelling reduction.

I am not now speaking about what the reserve board may do. I am speaking about what we do; about how we perform our duty. The universal experience, sir, is that the tendency of mankind is to keep on increasing the issue of currency. Unless there is some very positive and distinct influence tending toward the process of reduction, that tendency always has, in all the great commercial nations of the world, produced its natural results, and we may expect it to produce its natural result here, of continual, progressive increase.

The psychology of inflation is interesting and it is well understood. No phenomenon exhibited by human nature has been the subject of more thorough, careful, and earnest study than that presented by the great multitude of individuals making up the business world in any country in the process of gradual inflation. It is as constant as the fundamental qualities of humanity, and it differs in different countries only in degree, according to the hopefulness and optimism or the natural conservatism and caution of the people.

If the people of the United States have not wholly changed their nature from the nature which has been exhibited in all the financial history of England, from which many of us came; in all the financial history of France, from which many of us came; in all the financial history of Germany, from which many of us came; of Austria, of Italy; unless our human nature has been changed, we may confidently expect that under this proffer of easy money from a paternal Government, available for each one of us, available to send the lifeblood into the enterprise of every quarter of our vast country, available to enable all the young and hopeful and energetic Americans, east and west and north and south, to embark in business ventures which will lift them up from the hard conditions of daily toil, we may confidently expect that the same process will occur that has occurred time and time and time again in older countries.

That process is this: little by little the merchant, the manufacturer, the young man starting out for himself and with a good character, enough to give him a little credit; the man with visions of great fortunes to be won; the man with ideals to be realized; the inventor, the organizer, the producer; little by little, with easy money, they get capital to begin business and to enlarge business. As the business enlarges sales increase, and prosperity leads to the desire for growth. They all have before them spectacles of great fortunes made by the men who have grown from small beginnings to wonderful success — the Wanamakers, the Marshall Fields, the great manufacturers, the Fords. I could enumerate a thousand whose example, whose phenomenal success today inspire young Americans with boundless hope. Little by little business is enlarged with easy money. With the exhaustless reservoir of the Government of the United States furnishing easy money, the sales increase, the businesses enlarge, more new enterprises are started, the spirit of optimism pervades the community.

Bankers are not free from it. They are human. The members of the Federal reserve board will not be free from it. They are human. Regional bankers will not be free from it. They are human. All the world moves along upon a growing tide of optimism. Every one is making money. Every one is growing rich. It goes up and up, the margin between cost and sales continually growing smaller as a result of the operation of inevitable laws, until finally some one whose judgment was bad, some one whose capacity for business was small, breaks; and as he falls he hits the next brick in the row, and then another, and then another, and down comes the whole structure.

That, sir, is no dream. That is the history of every movement of inflation since the world's business began, and it is the history of many a period in our own country. That is

what happened to greater or less degree before the panic of 1837, of 1857, of 1873, of 1893, and of 1907.

So, sir, I can see in this bill itself, in the discharge of our duty, no influence interposed by us against the occurrence of one of those periods of false and delusive prosperity which inevitably end in ruin and suffering. For, Mr. President, the most direful results of the awakening of the people from such a dream are not to be found in the banking houses — no; not even in the business houses. They are to be found among the millions who have lost the means of earning their daily bread. They are to be found in the dislocation and paralysis of the great machinery which gives the value to the product of the toiler by transporting it from the place where it is produced, and is worthless because there is no one to use it, to a place where it can be used and by finding some one to use it who will pay for it.

This question for all my friends in the West, the farmers of the West, is not a question of country banks. It is a question that goes far deeper than that. When the farmer has put his toil and his savings into his crop of corn or wheat or cotton, for the reward of his industry and its continuance in future years and the support of his family, he depends upon what ? Why, sir, upon the continued and effective working of this vast machinery of transportation, distribution, and payment; and if that machinery is dislocated, if a necessary part refuses to work, it is like striking with a sledge hammer the machinery of the automobile; the car stops. The effect of such a period of inflation, of false prosperity, and of inevitable catastrophe, is to deprive every producer upon the farm, in the mine, in the factory, of the reward of his labors.

Mr. President, I am going presently to deal more specifically with just what will necessarily happen in the event of this process; but before doing that I want to call attention to the way in which pretty much all the wisdom that has not

been put into this bill has dealt with the problem in times past, and has concluded that it ought to be dealt with now. The method universally adopted in the great world of business for preventing such a proceeding is to have what we started out to try to get, an elastic currency. It is to provide for a currency that will come down by the operation of natural forces as well as go up. It is to put a limit, a limit first of self-interest, upon the increase, and then, beyond a certain danger point, an absolute prohibition.

It is manifest that when banks issue currency there is a certain limitation involved in the nature of things, because their credit is not unlimited, and they can go only about so far without their issues being affected. When you have a bank currency as they have in England and in France and in Germany and in Canada, the banks cannot in the nature of things go more than a little way beyond the legitimate requirement of the business of that country.

But we are proposing to furnish everybody who can draw and sign a bill, currency that has behind it the credit of the American people — the Government of the United States. What limit is there to that credit now? What limit up to this time? There may be a limit owing to the working of this bill, but there is none yet.

Furthermore, it has been the custom to impose specific limitations even upon the amounts the banks can issue. The Bank of England is limited to the gold actually in possession, except as to a certain small quantity, fifteen to eighteen million pounds sterling — something less than $90,000,000 — which it can issue as against Government securities, an amount which it is supposed will necessarily remain out in the pockets and the stockings and chimney-pieces of the people. The Bank of France is limited in amount; the German Bank in amount and by a progressive tax; the Canadian banks to the amount of their capital, with a certain

moderate excess specifically stated by statute for particular emergencies.

We have had a commission, a Monetary Commission, which has made a very careful and thorough study of this subject for the purpose of furnishing a basis upon which Congress might act. I think that commission included as good a representation of the ability and faithful devotion to service of the two Houses as it was possible to find. It was not partisan. Republicans and Democrats alike united, and they united in a report.

I am aware, sir, that upon some features of that report there is a violent opposition to the conclusions of the commission. Upon the question of a central bank, which they recommended, the platform of the Democratic party is supposed to have pronounced an adverse verdict. I am not going to discuss those questions; but certainly the conclusions reached by that commission, composed of men of both parties uniting upon the practical expedients by which an elasticity of currency may be secured and undue inflation may be prevented, is not a party question; it is not a partisan question; it is not a local question, but it is a question to which we can all address ourselves with a common desire to reach a conclusion for the best interests of our country.

The methods recommended by that commission to secure that result are, in substance, those which I have included in the amendment I have had the honor to present. The commission would make the notes issued not notes of the United States, to be loaned by the Government, but notes of the banks, with such limitation upon their issue, in the first place, as comes from the limit of credit of a creature as compared with the creator, and, next, with the specific limitation upon them that they shall be covered by a fifty per cent gold reserve, and that whenever that reserve falls below fifty per cent the reserve bank shall pay a special tax upon the defi-

ciency of the reserve at a rate increasing in proportion to the deficiency, as follows: For each two and one-half per cent, or fraction thereof, that the reserve falls below fifty per cent a tax of one and one-half per cent; so that if the reserve got down to forty-five per cent there would be a three per cent tax; if it got to forty per cent there would be a six per cent tax; if it got down to thirty-five per cent there would be a nine per cent tax; if it got down to thirty-three and one-third per cent it would stop absolutely.

Of course, the natural effect of that is that it becomes unprofitable for the bank to issue more money than the country requires, and you tell what the country requires by the ability to get the gold and by watching, as every banker who knows his business does watch, the course of business of each customer who is dealing with the bank.

Then there is another line of limitation. The line which I have just described is to bring down the quantity of notes put out. It is to make the elasticity downward, which is wholly omitted from the bill as it stands now, and it is to bring it down not by a command, not by vesting authority in somebody else to command it or require it, but by imposing a tax which will automatically make it for the self-interest of every banker to bring it down when the time comes at which it ought to come down. Then here is the other line, which is designed to put a rubber band on the expansion of this currency, so that the higher it goes the harder the band will pull and keep it back, and finally fixing a point where it must stop anyway.

I am now reading from the amendment which follows the recommendation of the Monetary Commission.

Any notes of the Federal reserve banks in circulation at any time in excess of an aggregate of $900,000,000 for all of said banks, which are not covered by an equal amount of lawful money, gold bullion, or foreign gold coin, held by said banks shall pay a special tax at the rate of one and one-half per cent per annum and any notes in excess of an aggregate of $1,-

200,000,000 for all said banks, not so covered, shall pay a special tax at the rate of five per cent per annum: *Provided*, That in computing said amounts of $900,000,000 and of $1,200,000,000 the aggregate amount of any national-bank notes then outstanding shall be included.

That will make it for the self-interest of the bankers not to push up their notes unduly, even though they have the reserves.

Right at this point I wish to call attention to the fact that we are already by other means inflating our currency. Of course, this bill very properly provides for retaining the present seven hundred and forty-odd million dollars of national bank currency. Either in their present form or in the converted form, the amount is to remain out. This provision of the amendment with its two figures of $900,000,000 and $1,200,000,000, would allow the increase of the currency without a repressive tax of about $160,000,000. That is bringing our seven hundred and forty-odd million dollars of present national bank currency up to $900,000,000.

It would allow under the repression of a tax the currency to go up $300,000,000 more. It is not made impossible, when business really requires it, to have $300,000,000 more. So it varies between $160,000,000 and $460,000,000 increase. After reaching $460,000,000, the five per cent tax comes down and makes it practically impossible or wholly unprofitable to increase.

I said we are inflating otherwise than by this proposed issue of Government notes. We have been quite progressive in our treatment of Government money. For a long time no Government moneys were deposited in banks except internal revenue receipts. Then, a few years ago, we broadened out, and we allowed the Secretary of the Treasury to deposit customs receipts upon certain securities. The practice under that permission has progressed. At first it was considered suitable for the Secretary of the Treasury to demand security

for the deposit of customs receipts of very much the same character as the security for the issue of currency; and he issued a list of the kind of bonds which he would take. Now — and I do not quarrel with it — the Secretary of the Treasury is making deposits on commercial paper. I say I do not quarrel with it, but it is a progressive increase of the available currency of the country; instead of having large amounts locked up in the independent Treasury.

Then, in this bill we are enlarging our currency. I will not call it inflating, because the word has a bad sense, and when I use it I mean it in a bad sense. We are enlarging our currency by the reduction of the reserves. Take, for instance, the central reserve banks. I will take, for example, the Bank of Commerce in New York, because I happen to be somewhat familiar with it. The Bank of Commerce has something over $100,000,000 of deposits — call it $100,000,000. Under the present law it has to keep twenty-five per cent of reserves — that is, $25,000,000, locked up in the vault. It cannot use them. If it does, the comptroller comes after the bank. Under this bill the reserve is reduced to $18,000,000. That releases $7,000,000. That one bank adds $7,000,000 to the available currency of the country. But that is not all. Of the remaining $18,000,000 of reserve that it has to keep, it only has to keep six-eighteenths in its vaults, and it has to put five-eighteenths into the regional bank. I think that is it. The difference between six-eighteenths in the vault and five-eighteenths it has to put in the regional bank, it can either keep in the bank or put in the vault. It is fair enough to assume that approximately one-half will go into the vaults and one-half into the bank, because that is permitted and that would be natural; but that half — that is to say, nine per cent — that $9,000,000 which will go into the regional bank will not be locked up, but sixty-five per cent of it can be loaned by the regional bank. So you find that

between twelve and thirteen millions of the money which that one bank has had to keep locked up in its vaults is going to be set free by the operation of this bill and added to the available live currency of the country.

I have not taken the trouble to figure it out, because it is not important, but extended to all the national banks, applying to all of them, the same process which sets free between twelve and thirteen millions of the money of the Bank of Commerce, you find a very handsome enlargement of the free and independent currency of our realm. So we are all moving in the same direction, in a direction which, unless brakes are put on somewhere, is going to land us in inflation. I conceive it to be our duty to put the brakes on, and not leave it for anybody else to do it or not to do it, as he sees fit.

Now, let me turn more directly to the consequences of the inflation which seems to me to be inevitable if we pass this bill as it is. I have said that a crash inevitably comes from the kind of process which easy money produces. But, Mr. President, long before that crash comes the rest of this world of commerce that we have so recently really entered upon will have seen the signals of the approaching storm. My memory, sir, goes back to the time when really there was no international banking in the United States, when our banks were all local institutions. I have seen the process go on step by step as we have grown in wealth and have extended our enterprise up to a point where we are engaged in a mighty commerce and where we feel every impulse given in the Old World; for the movements of trade are felt across the ocean as quickly as the diaphragm at one end of the telephone responds to the voice at the other, and every impulse that we give is felt in every civilized country of the world. We have entered into that companionship and we can never retire from it; for the vast and varied industries of our people are dependent upon the continuance of the processes which involve

conjoint and correlative action by our own and every other civilized country.

The rate of interest cannot go up two per cent in the city of New York but that the rate of exchange upon London falls. The rate of interest cannot go down but the rate of exchange upon London rises. The business men of Europe follow the course of business in the United States with a degree of solicitude and of careful attention and accurate information that no man in this chamber has ever equaled. They know the course of trade. They know the currents of opinion. They know the dangers that lie before us. They know what steps are being taken to avoid them. The confidence or distrust of American finance responds to the trained judgment of a multitude of men who are familiar with the business of the world, following carefully and with accurate information every movement of American finance and American commerce.

I say that long before the crash as the result of inflation, the men who are following our affairs in Europe will have seen the signals of the approaching storm. Why should they not, when we are carrying on a trade with Europe which involved during the year ended June 30, 1913, exports from this country to other countries of $2,428,506,358 in value, and imports from other countries in the same year of $1,812,978,234 ? Why should they not, when there are held in Europe of American securities, the stocks and bonds of our railroads and industrials and mines and manufactories, amounts variously estimated at from four to seven billion dollars ?

I have tried to see if I could get something more definite upon that, but it is pretty difficult to be very accurate; necessarily there must be some element of estimate. I have an estimate by Babson's Statistical Organization, a concern whose figures are well considered and are regarded as trustworthy. They say Europe holds over $7,000,000,000 of

American securities. My impression, gathered from my attempts to get information from other sources, is that that is rather a large estimate, but it is somewhere between $4,000,000,000 and $7,000,000,000. So there is reason why we should be carefully watched abroad. You must remember that those people who are engaged in business abroad have been through a hard experience. I doubt if the French will ever forget the results of their attempt to issue government money, the French assignat, which disappeared with the credit of the country. Great Britain has had her hard experience. The distress, suffering, and ruin that followed an inflation of her currency prior to the year 1811 led to the appointment of a special commission of the House of Commons to consider the whole subject and report upon it. In 1811, that commission brought into the House of Commons what is known as the Bullion Report, which is one of the great landmarks in the history of finance. That report was rejected by the House of Commons when it came in. It was treated by the House of Commons just as the report of our Monetary Commission is being treated by our Congress now; but in 1819, eight years after, the British Parliament came to see that the commission had been right and they had been wrong, and they adopted those sound principles recommended by that commission on which the currency and finances of Great Britain have been regulated ever since, the same principles which underlie and are expressed in the report of our Monetary Commission.

Mr. President, it is upon the sound basis of those principles embodied in the bullion report of 1811, once rejected and subsequently accepted by the British Parliament, that Great Britain has come to be the greatest financial, commercial, and industrial power that the civilized world has ever known. We should not be unwilling to learn something from the experience of a people who, through hard experience, have

come to an understanding that has made them so great and so successful.

Sir, with this past of their own and with this active interest in our affairs resulting from their intimate connection with them, I say again, long before the crash comes the people of finance and commerce in Europe will have seen its approach. The universal law under such circumstances is that the existence of an inflated currency and doubt of the soundness of financial policy immediately result in gold leaving the country. I say that is the universal law; that is the universal human experience. We can no more change it than we can make the light turn back on its course from the sun. I say the gold will leave the country; and I beg my fellow Senators to consider for a moment the elements of danger that will lie before us and that we ought to contemplate.

We set great store by the fact that the balance of trade is in our favor. For a number of years our exports have exceeded our imports by approximately $500,000,000, and for the last year $600,000,000; but that is only the visible trade, that is only the trade that finds its record in the custom houses. There is an invisible balance that we must not forget.

Before passing to that, let me suggest that we ought to remember that this balance of trade is not a constant quantity. It is certain to be affected by some circumstances of recent origin. To what extent no man can tell, but it is certain to be affected to some degree. One is the lower tariff. Of course that is expected to result in increased importations; that is the universal experience, and about that I suppose there will be no controversy. With the lower tariff that has just been adopted, the tendency will be to increase importations and *pro tanto* to cut down the balance of trade in our favor.

On the other hand, we all know that we are approaching the limit of our exportation of foodstuffs, that great basis of our exports of former years. We are importing beef from

Argentina, and wheat from Canada, and cattle also from Canada. Year by year our exports of foodstuffs have been going down, and we must hereafter chiefly depend for our exports upon manufactured products and cotton. Those are subject to vicissitudes — cotton to good and bad crops and manufactures to good and bad times. No one can tell what the effect is going to be upon our manufactures because of the causes already enumerated. This, however, is quite certain, that in many quarters there is going on a substantial reduction. I suppose the people who are reducing do not say much about it, because they are afraid of being hanged, but it is going on. I hope it will not continue; I hope it is but temporary; but we must consider the possibility of a reduction of our exports on that account, through the absorption of our food products by our own people and the increase of imports because of the lowering of the tariff.

I pass on to circumstances which, as I have said, produce an invisible trade balance that must not be left out of account. In the first place, there are the interest and the dividends which have to be paid upon the immense amount of securities held abroad. If you take a very moderate mean between the two estimates of four thousand million dollars and seven thousand million dollars and at a moderate estimate of interest, you will have to allow at least $250,000,000 going abroad annually to meet the interest and dividends paid every year to foreign holders of our securities.

The next item in that category is the expenditure of tourists abroad. Many years ago it used to be estimated that tourists spent annually a hundred million dollars abroad. The number of Americans who are fortunate enough to be able to go to Europe has enormously increased, and the best estimate that I have been able to get puts a minimum of the expenditures of American tourists abroad at $250,000,000 a year.

Then, as our merchant marine has practically disappeared, we pay the freight and the insurance — certainly practically all the freight one way — on the goods exported or goods imported, however the custom of the particular trade may be, and that freight is paid to the foreign steamship owners. A minimum estimate of that would be $50,000,000 a year. Then, there is the enormous amount of money that is sent abroad in small sums by our comparatively recent arrivals. Several years ago I know that an inquiry developed that over $70,000,000 of postal orders alone were sent abroad. Whole districts in southeastern Europe are being supported largely in that way. One hundred million dollars is a very moderate estimate for that. Of course there is, besides, a very great amount sent through private bankers; it is not confined to postal orders.

There we have, sir, $650,000,000, all of which has to be paid in gold and all of which goes abroad. With our exports at their height, with the apparent visible balance of trade in our favor at the highest point it has ever reached, without any diminution or set-off or set-back, this invisible outflow of gold, for the causes which I have mentioned, completely offsets the balance of trade, so that we stand without protection there.

There is another circumstance that we ought to consider, and which it is our duty to consider, when we are forecasting what may happen in the future in the working of the system we are proposing, and that is that for several years our railroads — and I suppose to some extent our industrial concerns — have found it difficult to renew bonded indebtedness by long-term bonds. They have been living from hand to mouth by putting out short-term securities or notes having less than a year or but little over a year to run. Of course those notes, taking them in the aggregate, constitute an element of danger, because they come pretty near being demand obligations, and if before they come due doubt is created, if

before they become due an unfavorable judgment about the financial policy of the United States is created abroad, then look out. They will have to be paid. If they are not paid, what will happen? The destruction of credit, not alone of the railroads issuing them, not alone of the banks holding them, but of the multitude of people who are carrying on their business and securing capital upon the securities, the stocks and bonds, of the corporations which have issued the short-term notes.

Let me not forget before I finish this to speak about the quantity. The *Journal of Commerce* of November 19 of this year contained an article which gives the result of an investigation made by that very trustworthy journal into the subject. It states that the amount of short-time securities coming due within three years is about one thousand million dollars. I have another estimate, taken from a pamphlet issued by the Guaranty Trust Company of New York, a trustworthy institution and one which certainly has no object in not giving correct figures — they have every interest to give correct figures — and I do not doubt that this is the result of careful inquiry. They give the amount of short-term securities due in 1914, omitting everything but the millions, as $468,000,000; in 1915, $320,000,000; in 1916, $90,000,000; in 1917, $88,000,000; and in 1918, $111,000,000. That would make in the next three years $879,000,000, and in five years $1,079,000,000. So here are, in round numbers, $1,000,000,000 in short-term securities about to become due, and from four to seven thousand millions of securities held in Europe.

Here, considering always the question as to whether we are in danger from the consequence of a loss of confidence in our financial policy in Europe, we must not forget another tendency of recent years that has been very disquieting. It has been to restrict the railroad transportation companies, to

restrict their rates, and to enlarge their obligations — that is, their duties — in a manner very disquieting to the holders of railroad securities; and the tendency in recent years has been, in legislation, in litigation, and in public expression, to promote treatment of industrial corporations in a manner very disquieting to the holders of their securities. I am not now expressing any opinion regarding either of these tendencies. It would lead me into a discussion quite apart from my present object. I am merely stating the fact that the railroads, rightly or wrongly, complain that their rates are being held down by the Interstate Commerce Commission and that their expenses are being pushed up by the demands of labor and by the increased cost of all materials, so that the margin between expenditures and income is gradually decreasing, and they are saying that the process cannot go on without cutting off dividends. I am not going to argue about that, but it is undeniable, and it is supported by the fact that some railroad corporations have been compelled to adopt that policy. The Chicago, Milwaukee & St. Paul Railroad has reduced its dividends, the New Haven Railroad has passed its dividend, and other railroads have reduced their dividends. All this will necessarily have a certain disquieting effect, and tend toward distrust on the part of the holders of the thousands of millions of dollars of our securities abroad.

The threats against the industrial corporations have had very much the same effect, and we may rely upon it that the holders of this great mass of American securities abroad are going to be in a condition of sensitive alertness regarding our credit and the soundness of our financial policy. In that condition it requires very little to produce immediate results. The same kind of an outcry that started a run on the bank in Omaha, which the Senator from Nebraska told us about yesterday, would start a run on us. It would take very little,

not merely to stop foreign investment in our enterprises, but to bring tumbling back upon us the thousands of millions of securities now held abroad; and when they come, they must be bought; they will be bought; and they will all have to be paid for in gold, and the gold will leave our country; it will go abroad to pay for the securities which come here.

Very little things start a process like that. Mr. President, in March, 1907, there were over $200,000,000 of American securities sent back from Europe, merely on the judgment of people there that our affairs were not going quite right. So, long before October, the wise ones there had an idea that things were not going quite right here; they had dimly foreseen what would happen in the panic of 1907; and over $200,000,000 of securities came over here and had to be bought, and the gold went to Europe. That is one of the things that helped to accentuate the conditions that produced the panic. The Senator from Rhode Island [Mr. Lippitt] observes justly that it was one of the very important things. Last September over $200,000,000 came over here on some judgment of some people that it would be wise to reduce the risk of our finances here. A very little loss of confidence would bring this whole mass tumbling down on us; and, as I have said, when they come they will be bought, and the gold will go to Europe to buy them and pay for them.

The way it works out, Mr. President, is this: if somebody in London sells something here, it has to be paid for in gold, of course. The debtor here goes out into the market to buy London exchange; if he can buy it for less than it costs to ship the gold, he buys it and he pays his debt with it — that is, he pays his debt to the man in London by a bill drawn on London, which the man in London can turn into money there.

The cost of shipping gold is along in the neighborhood of two per cent, and therefore the American banker will buy bills

if he can get them within two per cent, but if it costs more than it costs to ship gold, he ships the gold, and the gold goes out. Of course, the greater the amount that must be paid the higher the cost of exchange, and therefore the more gold goes physically from this shore to the other in order to make the payment. When exchange is high, gold goes out; when exchange is low, gold stays or comes this way.

To go one step further in the process, the people who have to pay this gold abroad have a perfectly simple process through which to get it. They go to their bank, and, unless the transaction is carried on entirely through credit, if they do not get the gold in that way by check, they always are at liberty to draw greenbacks, and with the greenbacks they take the gold out of the Treasury; or, if under this bill they get reserve notes, government notes, the notes are always to be redeemable in gold at the Treasury, or gold or lawful money at the banks, and with the notes they can get the gold, or they can get greenbacks with which they can get the gold. When the amount of money to be paid in a foreign country exceeds the amount that is coming from the foreign country you cannot keep gold in any reserve except by failure — suspension of payment. There is a continual draft that cannot be prevented.

I said that these securities, when they come here, will be bought. They must be bought. If they are not, if nobody buys them, they go down and down and down, and the credit of all the great industrial and transportation organizations of this country is ruined, and none of them can raise any more money anywhere, in any way, on any terms. What is more than that, the banks that hold the securities are ruined, and the men who have put the securities behind their obligations to the banks in order to conduct their business are ruined.

Mr. President, I am quite in favor of doing away with the speculative use of money in the city of New York; but that is

by no means doing away with the use of the great body of the securities of the country as a basis of credit. That speculative use is but a trifle compared with the vast employment of ownership certificates, bonds or stocks, in the great enterprises of the country, by private individuals, as a basis for the credit on which they get the means to conduct their business. If you let the prices of these securities, when they come back here, go down out of sight, the business of the country goes down with them to ruin. There is no use discussing whether they must be bought. They will be bought. The human nature of private, individual persons will lead them to buy, and the payment will go abroad.

There is another thing you must remember. Europe is an armed camp. For many, many years peace has been kept by the most delicate adjustments and by the most strenuous exertions of many men in many countries, who have been alert and solicitous to stop controversy as near its origin as possible, and to prevent the frightful effect of general war; but war is always possible. The fear of it is always present. If a war comes, immediately our securities come back to us. Immediately, in every country where they are held, the desire to strengthen up, to increase the amount of gold, will operate to lead to a general conversion of the American securities they hold into immediately available gold.

It is not necessary that we should wait for a war actually to take place. The fear of it leads to the result. The fear of the Balkan War, far off on the edge of civilized Europe as it was, because of the apprehensions of possible implication of the great commercial nations in a war consequent upon the Balkan War, sent back to this country hundreds of millions of securities, which had to be bought.

So, sir, if we enter upon this career of inflation we shall do it in the face of clearly discernible danger — danger which, if realized, will result in dreadful catastrophe.

I have been giving the reasons why the results I describe would happen; but it ought not to be necessary to give them or to argue about them, for the experience of mankind has been reduced to the expression of economic laws which are universally admitted. There is no better known economic law than the one which passes by the name of Gresham's law. We all know it. It is that inexorable law under which, if there are two kinds of currency in a country, and one is better than the other, the better one leaves the country and the poorer one remains. That has come to be an axiom, and I ought not to have to argue about it. The inevitable result of the inflation of our Government currency will be the application of that unquestioned law.

It is stated in another form in this way: gold always leaves a country in which the amount of currency exceeds the demands of legitimate business. That is another way of stating the same law. It is just as absolute, just as certain, just as irrefutable, just as universally accepted, as the other form of stating it, and it describes exactly what is going to happen to us.

Another form of stating it, one that our old friend Professor Sumner has used as the result of his study of the history of American currency, is that gold always tends to move away from the country of high prices to the country of low prices, because in the country of low prices it avails more; it buys more; it is of higher value in proportion to commodities than in the country of high prices. It is inevitable; and of course the effect of inflation is to work prices up, up, up, and the gold goes out, and you cannot stop it.

You cannot control the operation of these laws. You could kill the people who are engaged in business; you could take them out of their business and shut them up in jail, and perhaps you could stop the operation of the law then by stopping the business; but there is no other way.

Mr. President, as against the working of that law, your raising the rate of interest, or your attempting to sell Government securities, will be just as ineffective as Mrs. Partington's mop against the Atlantic Ocean, because you do not bring into operation your forces until the damage is done. When confidence is lost, you can raise the rate of interest to the roof, but you do not bring the money until you restore confidence. In proportion as confidence decreases, you have to add to your rate of interest insurance against loss; and long before we wake up from our dream of prosperity upon inflated currency, the sources from which the gold will have to come to keep us from catastrophe will have lost their confidence, so that no rate of interest will bring the money but a rate so high as to ruin American business.

So as to the sale of Government securities. Ah, yes; now, behind the system under which we are working, and under which we have grown so great and strong, stands always the Government of the United States, with its credit unimpaired, with its solvency undoubted, always ready to come to the rescue by the sale of its securities to bring gold. This bill proposes, however, to put in pawn the credit of the United States; and when your time of need comes, it is the United States that is discredited by the inflation of its demand obligations which it cannot pay.

Mr. President, I ought not to be obliged to argue about inflation. The country has rendered its judgment upon it. The American people closed the case for and against inflation when, by the vast preponderance of their approval, they sustained the veto of the inflation bill by President Grant, in 1874. The American people decided the case when they sustained the courage and patriotism of Grover Cleveland in putting at stake all his future upon compelling the repeal of the Silver Purchase Act in 1893. The American people decided the case when, in 1896, they elected Mr. McKinley as

against the protagonist of the fundamental ideas contained in the sixteenth section of this bill; and again in 1900, when they reëlected President McKinley against the same opponent.

Now, Mr. President, a Democratic majority has been elected by the people, not upon this issue, but in a campaign which proceeded upon subjects, questions and matters of interest far removed from the old, old question of sound money or inflated currency. Coming into power, the Democratic party, without any mandate from the people of the United States, without any authority from the people of the United States, undertakes to reverse the oft-repeated judgment of the people of the United States upon this question. In probably a vain appeal from the judgment of the Democratic caucus and their violation of the duty imposed upon them by the repeated decisions of the people of the country, I protest against the employment of power thus obtained for such a purpose as this.

Mr. President, my colleague has observed that power is given to the central reserve board to regulate the issue of currency. That is true; but I observed at the time that we have our duty to perform, and that we cannot discharge it by transferring it to anybody else. Always up to this time the American Congress has attempted to perform its own duty in regard to the vital matter of currency. Always the American Congress, when it did not want inflation, has undertaken so to frame its legislation that its injunctions and requirements would prevent inflation. Now it is proposed that we shall make it possible that an appointive officer, or a body of appointive officers, shall bring upon the country the result of inflation; and we are to appease our own consciences by assuming that that board will perform the duties that we ought to perform.

Mr. President, I do not purpose to question the probable honesty, good faith, or public spirit of the men who may be

appointed members of the central reserve board under this bill. But, sir, this bill in the provision which I have been discussing, and in another provision to which I shall presently allude for a brief moment, exhibits an expression of the opinion of a very great leader of the Democratic party, for whom I have a strong personal regard, whom I respect and admire, and in whose sincerity of purpose and good faith I firmly believe. Yet, Mr. President, I am convinced that his economic theories are false, and, if put into effect, would be most injurious to our country.

Those theories have been twice expressly repudiated by the people of the country. Twice those specific theories, the same theories of finance, make their appearance in this bill; and, as a matter of course, we ought to assume that any central reserve board appointed to carry out the terms of the bill will be appointed under the same dominant, commanding, and irresistible influence.

Mr. President, a central reserve board appointed under the influence of the same power that put into this bill the present sixteenth section, will be bound, if they are honest and true and faithful, to proceed in accordance with the theories that our people rejected in 1896 and 1900. They must. The authors of the bill are bound in good faith to appoint men who are in sympathy with them to carry it out; and the men in sympathy with them will have in good faith to carry out this bill under the belief that it is best for the people of the country that the Government of the United States shall furnish unlimited money to the people of the United States.

I say that this bill presents the financial heresy twice repudiated by the people of the United States. I say that the central reserve board appointed under this bill will have to represent that very heresy. If this bill passes as it stands, America stands to lose all we saved when Grant vetoed the inflation bill, all we saved when Grover Cleveland abolished

the silver purchase, all we saved when we elected McKinley, all the Republicans, all the gold Democrats saved when they helped in the repudiation of the vital principle which has been put into this bill.

The country has become so deadened by the assaults of sound, so wearied of discussion, so confused and dazed by complicated figures, that this vital and fateful reversal of the American policy is proceeding with but little attention. But unless all our history of human experience and all the previous judgments, the real judgments, of the American people upon this subject have been wrong, we stand to learn by hard experience what has really been done by the sixteenth section of this currency bill.

A PERSONAL STATEMENT

REMARKS IN THE SENATE OF THE UNITED STATES, DECEMBER 16, 1913

On December 13, 1913, Mr. Root made the preceding speech upon the bill to provide for the establishment of federal reserve banks, to furnish an elastic currency, and for other purposes. Upon the delivery of this speech, Senator Gallinger, of New Hampshire, gave to the public press a statement advocating Mr. Root's nomination as the Republican candidate for the presidency in 1916, from which the following passage is quoted:

> The remarkable speech on the currency question delivered by Senator Root today stamps him as the ablest advocate of sound economic and financial doctrines. His wonderful powers of analyzing the fundamental problems that lie at the foundation of our governmental structure were never more marked than today. His discussion of the financial bill was brilliant, interesting, and unanswerable. Unless the Republican party nominates Senator Root as their next candidate for President of the United States, they will miss the greatest opportunity that has ever presented itself to that party.

In view of the wide publicity given by the press to Senator Gallinger's statement, and the approval which it seemed to find in many quarters, Mr. Root felt obliged to take notice of the proposal on the floor of the Senate, and frankly to state the reasons which, in his opinion, should militate against his nomination as the presidential candidate of his party.

Mr. Root's personal statement, elicited by that of Senator Gallinger and by allusions to it on the floor of the Senate, was made on December 16, 1913, and was as follows:

BEFORE passing to another amendment, I wish to make some observations regarding the several replies which were made yesterday to the argument I made last Saturday regarding what seemed to me to be the possibilities of inflation under the pending currency bill.

I am going to depart from the custom to which my feeling ordinarily holds me and make a remark regarding some personal allusions which occurred in the speeches of two, perhaps three, of the Senators who replied to me. Those Senators saw fit to intimate that my motive in making the argument I did make was not merely the desire to contribute what I could to the fair and intelligent discussion of the merits of this bill, but that there was also a motive of personal

ambition coloring my judgment and affecting my utterances.

That is not a very cogent argument in itself, for what a Senator says here is to be judged by the weight of what is said rather than by any motives he may have in saying it. Nevertheless, I have this to say about it, and I should not say it were it not for the fact that a public statement has appeared coming from the senior Senator from New Hampshire, and that public statement has been commented upon in this chamber and in the public press, the substance of the statement being that under some circumstances I might be a candidate for the presidency of the United States.

I shall always be grateful for the friendship and the good opinion of the Senator from New Hampshire, and for the too-partial friendship which has led other gentlemen to express agreement with him; but I ask my friends upon the other side who do not agree with him and in whose minds a suspicion of personal ambition upon my part may detract from the weight of my utterances, to remember the fact that before this Administration comes to a close and the next President has been inaugurated, I shall have reached the age of seventy-two years. Before the next Administration comes to a close I shall have passed the age of seventy-six years. It is manifestly impossible that I should be the President of the United States. I could not render the service. I would not undertake it. I would not accept the nomination. I could not accept the office.

Such suggestions are and can be merely a graphic way of expressing the feelings of friendship and approval. My political career and my public career are drawing to a close. No political ambition whatever finds its place in the horizon of my future. I look with sympathy and interest upon the younger and more vigorous men who surround me, who rightfully cherish ambitions for place and usefulness of service for our country, but I have no part in them.

HOW TO PRESERVE THE LOCAL SELF-GOVERNMENT OF THE STATES

A BRIEF STUDY OF NATIONAL TENDENCIES

SPEECH AT THE DINNER OF THE PENNSYLVANIA SOCIETY IN NEW YORK, DECEMBER 12, 1906

THIS gathering peculiarly represents two ancient commonwealths, each looking back to a century and a half of colonial history before the formation of the American Union, each possessed of strong individuality, derived from the long practice of self-government, and both conspicuous among all the States for leadership in population and wealth, for commerce and manufacture, for art and science, and for the priceless traditions of great citizens in former generations. It seems appropriate to make here some observations upon a subject which is much in the minds of thoughtful Americans in these days.

What is to be the future of the States of the Union under our dual system of constitutional government?

The conditions under which the clauses of the Constitution distributing powers to the national and state governments are now and henceforth to be applied, are widely different from the conditions which were or could have been within the contemplation of the framers of the Constitution, and widely different from those which obtained during the early years of the Republic. When the authors of *The Federalist* argued and expounded the reasons for union and the utility of the provisions contained in the Constitution, each separate colony transformed into a state was complete in itself and sufficient to itself, except as to a few exceedingly simple external relations of state to state and to foreign

nations; from the origin of production to the final consumption of the product, from the birth of a citizen to his death, the business, the social and the political life of each separate community began and ended for the most part within the limits of the state itself; the long time required for travel and communication between the different centers of population, the difficulties and hardships of long and laborious journeys, the slowness of the mails, and the enormous cost of transporting goods, kept the people of each state tributary to their own separate colonial center of trade and influence, and kept their activities within the ample and sufficient jurisdiction of the local laws of their state. The fear of the fathers of the Republic was that these separate and self-sufficient communities would fall apart, that the Union would resolve into its constituent elements, or that, as it grew in population and area, it would split up into a number of separate confederacies. Few of the men of 1787 would have deemed it possible that the Union they were forming could be maintained among eighty-five millions of people, spread over the vast expanse from the Atlantic to the Pacific and from the Lakes to the Gulf.

Three principal causes have made this possible.

One cause has been the growth of a national sentiment, which was at first almost imperceptible. The very difficulties and hardships to which our nation was subjected in its early years, the injuries to our commerce, and the insults and indignities to our flag on the part of both of the contestants in the great Napoleonic wars, served to keep the nation and national interests and national dignity constantly before the minds and in the feelings of the people. As the tide of emigration swept westward, new states were formed of citizens who looked back to the older states as the homes of their childhood and their affection and the origin of their laws and customs, and who never had the peculiar and special, separate

political life of the colonies. The Civil War settled the supremacy of the nation throughout the territory of the Union, and its sacrifices sanctified and made enduring that national sentiment. Our country as a whole, the noble and beloved land of every citizen of every state, has become the object of pride and devotion among all our people, North and South, within the limits of the proud old colonial commonwealths, throughout the vast region where Burr once dreamed of a separate empire dominating the valley of the Mississippi, and upon the far-distant shores of the Pacific; and by the side of this strong and glowing loyalty to the nation, sentiment for the separate states has become dim and faint in comparison.

The second great influence has been the knitting together in ties of common interest, of the people forming the once separate communities through the working of free trade among the states. Never was a concession dictated by enlightened judgment for the common benefit, more richly repaid than that by which the states surrendered in the Federal Constitution the right to lay imposts or duties on imports or exports without the consent of Congress. To it we owe the domestic market for the products of our farms and forests and mines and factories without a parallel in history, and an internal trade which already exceeds the entire foreign trade of all the rest of the world; and to it we owe in a high degree the constant drawing together of all parts of our vast and diversified country in the bands of common interest and in the improving good understanding and kindly feeling of frequent intercourse.

The third great cause of change is the marvelous development of facilities for travel and communication produced by the inventions and discoveries of the past century. The swift trains that pass over our two hundred and twenty thousand miles of railroad, the seventy millions of messages

that flash over the more than fourteen hundred thousand miles of telegraph wires, the conversations across vast spaces through our more than four million four hundred thousand telephone instruments, take no note of state lines; they have broken down the barriers between the separate communities and they have led to a reorganization of the business and social life of the people of the United States along lines which, for the most part, altogether ignore the boundaries of the states. I left the borders of Virginia this afternoon and traversed Maryland, Delaware, Pennsylvania, and New Jersey to the state of New York, and, barring accident, I shall breakfast tomorrow morning again on the shore of the Potomac. The time required for this journey would hardly have sufficed for an ordinary carriage drive from the adjoining county of Westchester a hundred years ago. Any one of us can go now into a neighboring room in this hotel and talk with a friend in Boston or Chicago and recognize his voice and transact business which formerly would have required months to accomplish, if it could have been done at all. The lines of trade, of financial operation, of social intercourse, of thought and opinion that radiate from the great centers of life in our country such as Boston and New York, and Philadelphia and Baltimore, and Chicago and St. Louis, and New Orleans and San Francisco, and many another great city, are perfectly regardless of state distinctions. Our whole life has swung away from the old state centers and is crystallizing about national centers; the farmer harvests his grain and fattens his cattle, not as formerly, with reference to the wants of his own home community, but for markets thousands of miles away; the manufacturer operates his mills and his factories to meet the needs of far-distant consumers; the merchant has his customers in many states; all — the farmer, the manufacturer, the merchant, the laborer — look for the supplies of their food and clothing, not to the resources of

the home farm, or village, or town, but to the resources of the whole continent. The people move in great throngs to and fro from state to state and across states; the important news of each community is read at every breakfast table throughout the country; the interchange of thought and sentiment and information is universal; in the wide range of daily life and activity and interest the old lines between the states and the old barriers which kept the states as separate communities are completely lost from sight. The growth of national habits in the daily life of a homogeneous people keeps pace with the growth of national sentiment.

Such changes in the life of the people cannot fail to produce corresponding political changes. Some of those changes can be plainly seen now in progress. It is plainly to be seen that the people of the country are coming to the conclusion that in certain important respects the local laws of the separate states, which were adequate for the due and just regulation and control of the business which was transacted, and the activity which began and ended within the limits of the several states, are inadequate for the due and just control of the business and activities which extend throughout all the states, and that such power of regulation and control is gradually passing into the hands of the National Government. Sometimes by an assertion of the interstate commerce power, sometimes by an assertion of the taxing power, the National Government is taking up the performance of duties which under the changed conditions the separate states are no longer capable of adequately performing. The federal anti-trust law, the anti-rebate law, the railroad rate law, the meat-inspection law, the oleomargarine law, the pure-food law, are examples of the purpose of the people of the United States to do through the agency of the National Government the things which the separate state governments formerly did adequately but no longer do

adequately. The end is not yet. The process that interweaves the life and action of the people in every section of our country with the people in every other section, continues and will continue with increasing force and effect; we are urging forward in a development of business and social life which tends more and more to the obliteration of state lines and the decrease of state power as compared with national power; the relations of the business over which the Federal Government is assuming control, of interstate transportation with state transportation, of interstate commerce with state commerce, are so intimate and the separation of the two is so impracticable, that the tendency is plainly toward the practical control of the National Government over both. New projects of national control are mooted; control of insurance, uniform divorce laws, child-labor laws, and many others affecting matters formerly entirely within the cognizance of the state are proposed.

With these changes and tendencies, in what way can the power of the states be preserved ?

I submit to your judgment, and I desire to press upon you with all the earnestness I possess, that there is but one way in which the states of the Union can maintain their power and authority under the conditions which are now before us, and that way is by an awakening on the part of the states to a realization of their own duties to the country at large. Under the conditions which now exist, no state can live unto itself alone, and regulate its affairs with sole reference to its own treasury, its own convenience, its own special interests. Every state is bound to frame its legislation and its administration with reference not only to its own special affairs, but with reference to the effect upon all its sister states, as every individual is bound to regulate his conduct with some reference to its effect upon his neighbors. The more populous the community and the closer individuals

are brought together, the more imperative becomes the necessity which constrains and limits individual conduct. If any state is maintaining laws which afford opportunity and authority for practices condemned by the public sense of the whole country, or laws which, through the operation of our modern system of communications and business, are injurious to the interests of the whole country, that state is violating the conditions upon which alone its power can be preserved. If any state maintains laws which promote and foster the enormous overcapitalization of corporations condemned by the people of the country generally; if any state maintains laws designed to make easy the formation of trusts and the creation of monopolies; if any state maintains laws which permit conditions of child labor revolting to the sense of mankind; if any state maintains laws of marriage and divorce so far inconsistent with the general standard of the nation as violently to derange the domestic relations, which the majority of the states desire to preserve, that state is promoting the tendency of the people of the country to seek relief through the National Government and to press forward the movement for national control and the extinction of local control. The intervention of the National Government in many of the matters which it has recently undertaken would have been wholly unnecessary if the states themselves had been alive to their duty toward the general body of the country.

It is useless for the advocates of state rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the states themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect any one's right to exercise a power which he fails to exercise. The govern-

mental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the governments of the states, but the people will have the control they need, either from the states or from the National Government; and if the states fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised — in the National Government. The true and only way to preserve state authority is to be found in the awakened conscience of the states, their broadened views and higher standard of responsibility to the general public; in effective legislation by the states, in conformity to the general moral sense of the country; and in the vigorous exercise for the general public good of that state authority which is to be preserved.

ADDRESS AT THE CONFERENCE OF THE GOVERNORS OF THE STATES

WHITE HOUSE, MAY 13–15, 1908

On October 3, 1907, the Inland Waterways Commission, of which Senator Theodore E. Burton was chairman, recommended to President Roosevelt that he call a conference of the governors of the states of the Federal Union to consider the policy of " conserving those material resources on which the permanent prosperity of our country and the equal opportunity of all our people must depend." Upon receipt of this communication, President Roosevelt decided to comply with the formal request; and in the following month he wrote letters of invitation to the governors of all the states and territories to meet at the White House on May 13–15, 1908, in a Conference on the Conservation of National Resources. The invitation was also extended to senators and representatives, to the justices of the Supreme Court, the members of the Cabinet, and many private business organizations.

In his letters, the President said: "The conservation of natural resources is our fundamental problem. Unless we solve that problem, it will avail us little to solve all others." All the governors of the states and territories accepted the invitation, and attended the conference, except three who were prevented by ill-health or pressure of public affairs.

A conference of representatives of Mexico, Canada, and Newfoundland was held in Washington, February 18, 1909, and on February 19, 1909, Robert Bacon, Secretary of State, instructed the American diplomatic officers abroad to invite the Governments to which they were accredited to send delegates to an international Conservation Conference to be held at The Hague. The projected conference did not take place, but a conference on the conservation of natural resources was held at Washington, December 27, 1915—January 8, 1916, in connection with the Second Pan-American Scientific Congress.

The following address was delivered at the Conference of 1908:

WHAT occurs to me today, in response to your very kind call upon me, is what comes naturally to the mind of the officer who is the official medium of communication between the Government of the United States and the governments of the states.

Forty-four sovereign states are represented here, I see by the newspapers; all sovereigns here on the invitation of the Executive of the sovereign nation, the United States. No

one can over-estimate the importance of maintaining each and every one of the sovereignties of the states, and no one can over-estimate the importance of maintaining the sovereignty of the nation.

The nation cannot perform the functions of the state sovereignties. If it were to undertake to perform those functions, it would break down. The machinery would not be able to perform the duty. The pressure is already very heavy upon national machinery to do its present work.

I feel deeply impressed, however, with the idea that the forty-six sovereign states, in the performance of their duties of government, are lagging behind the stage of development which the other sovereignties of the earth have reached. As the population of our states increases, as the relations between the people of each state and other states grow more frequent, more complicated, more important, more intricate, what every state does becomes more important to the people of every other state.

If you look at the international life of the world, you will see that the correspondence between the nations is continually increasing, not in the letter-writing sense, but in the intercommunication and understanding about the things that they should do in concert for the benefit of all their people.

Scores and hundreds of conferences and congresses are being held under government auspices to regulate the action of the different nations of the earth. England and France and Germany and Spain, indeed all the nations of Europe, are considering the conduct of their governments with reference to the effect which their action will have upon the people of each other country.

Now the states, in the exercise of their sovereignty, in the exercise of the powers reserved to them, rest under the same kind of duty, — a duty that forbids any state to live unto itself alone.

The Constitution of the United States prohibits the states from making any agreement with each other without the consent of Congress; but you can make any number of agreements with the consent of Congress. Why should not the powers that are reserved to the state sovereignties be exercised by those sovereignties, with a wise regard for the common interest, upon conference, upon complete understanding of the duties of good neighborhood, under a firm resolve to make it wholly unnecessary that this continual pressure to force the National Government into the performance of the duties that the states ought to perform should continue ?

It is high time that the sovereign states of the Union should begin to perform their duties with reference not only to their own local individual interests, but with reference to the common good.

I regard this meeting as marking a new departure, the beginning of an era in which the states of the Union will exercise their reserved sovereign powers upon a higher plane of patriotism and love of country than has ever existed before.

IMPORTANCE OF SEEKING REFORM THROUGH STATE GOVERNMENTS

REMARKS AT THE TENTH ANNUAL DINNER OF THE NATIONAL CIVIC FEDERATION, NEW YORK, NOVEMBER 23, 1909

I HAVE a decree by the president of the National Civic Federation limiting my hours of labor on this day to five minutes and a contract in violation of the Sherman Act to restrain my output. I have come here welcoming the opportunity to express my sympathy with the purposes and my belief in the usefulness of this organization. The essential process of free government is free discussion. Discussion confined to people of the same way of thinking, with the same interests, the same purposes and prejudices, tends only to strengthen their common difference from all others and to increase the divergence between different groups of our people; but discussion, information, sincere and earnest attempt to get at each other's minds and to learn as well as to teach among people with different environments, different specific interests and different points of view, leads to that common public opinion whose expression in the end comes the nearest to being the voice of God that man has ever attained. The essential quality of that discussion which makes a free people competent to govern itself is self-restraint, respect for the opinions and the wishes, aye, for the prejudices and the mistakes of others, a sincere desire for harmony of view, for reconciliation of difference and for the reaching of the right and just conclusion. As between individuals, as between groups of citizens, as between nations, isolation is the parent of misunderstanding, of hatred and of strife. Conference,

mutual knowledge, the softening that comes from meeting our fellow-men face to face — that is the process by which good citizenship and sound and rational judgment result.

I wish, also, to express my sympathy with the prevailing opinion I perceive here upon the specific subject of your recent discussion. It seems to me that our present system of dealing with those injuries that come to the employees in our great industrial life is foolish, wasteful, ineffective and barbarous. To have a great enlightened nation ignoring the fact that in all industries there are accidents, and that every crushed foot, every broken arm, every ruined life, is expended in the business, is a part of the cost of doing the business, is discreditable. All accidents, all injuries are subject to the law of average. The cost of support, which is made necessary by the injuries suffered in a business, is just as much a part of the cost of the business as the tools that are worn out and the material that is consumed. It ought to be paid for by the business as a part of that cost and not left to the charity of the nation at large. It ought to be paid for so that the man, who has spent his life and his strength and his limbs as a necessary part of doing the business, will feel that he is being paid in a way that preserves his manhood instead of being thrown upon charity in a way that destroys it. I hope we have begun on the pathway that will lead to more reasonable and rational treatment of this subject.

I cannot altogether agree with the view taken by Mr. Kingsley as to throwing the burden of dealing with insurance upon the National Government. I have long thought that in the case of Paul *v.* Virginia,[1] which decided the question to which he referred, the Supreme Court of the United States was right. If, however, there were no other question but the question whether the National Government or the State Governments should deal with insurance, it might not be so

[1] 8 Wallace, p. 168.

important and I might feel willing to say, as Mr. Jefferson suggested when he bought Louisiana, that the advocates of his view of constitutional interpretation ought to be willing to suspend their views for a little while for a particular and useful purpose. But you cannot confine the proposal to insurance alone. The framework of our Government aimed to preserve at once the strength and protection of a great national power, and the blessing and the freedom and the personal independence of local self-government. It aimed to do that by preserving in the Constitution the sovereign powers of the separate states. Are we to reform the Constitution ? If we do it as to insurance, we must do it as to a hundred and thousand other things. The interdependence of life, wiping out state lines, the passing to and fro of men and merchandise, the intermingling of the people of all sections of our country without regard to state lines, are creating a situation in which from every quarter of the horizon come cries for federal control of business which is no longer confined within the limits of separate states.

Are we to reform our constitutional system so as to put in federal hands the control of all the business that passes over state lines ? If we do, where is our local self-government ? If we do, how is the central Government at Washington going to be able to discharge the duties that will be imposed upon it ? Already the administration, already the judicial power, already the legislative branches of our Government, are driven to the limit of their power to deal intelligently with the subjects that are before them. This country is too great, its population too numerous, its interests too vast and complicated already, to say nothing of the enormous increases that we can see before us in the future, to be governed as to the great range of our daily affairs, from one central power in Washington. After all, the ultimate object of all government is the home, the home where our people

live and rear their children, with its individual independence, its freedom; and I am not willing, for the sake of facilitating transaction of any kind of business, to overturn limitations that have been set by the Constitution — wisely set — between the powers of the National and State Governments.

Great is our nation. Let it exercise its constitutional powers to the fullest limit, but do not let us in our anxiety for efficiency cast away, break down, reject, those limits which save to us the control of our homes, of our own domestic affairs and of our own local governments. For there, in the last analysis, under the protecting power of our great nation, there must be formed the character of free, independent, liberty-loving citizens upon whom our Republic must depend for its perpetuity.

THE SPIRIT OF SELF-GOVERNMENT

ADDRESS AT THE ONE HUNDRED AND FORTY-FOURTH ANNIVERSARY BANQUET OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, NOVEMBER 21, 1912

I THANK you with entire sincerity and much feeling for your reception, and for the kind expressions which old friendship and the association of a lifetime have made it possible for your president to utter. However old I may come to be, I shall never pass out from under the impression of reverence for the men who forty to fifty years ago made the Chamber of Commerce; and first among them in my memory stands the noble and inspiring presence of the father of your present president.[1]

I thought of those men when some dozen years ago, a great excitement had carried a large number of people to the barren and uninhabited land on the shores of the Bering Straits. Fifteen thousand men found themselves there without government, without law, and without organization. In characteristic American fashion they proceeded to organize a Chamber of Commerce of Nome. And they called upon the War Department to send them some officers and men to enable them to execute the decrees of the Chamber of Commerce for the benefit of the people on that shore. The call was responded to after the fashion in which the American army is all the time doing odd jobs for the promotion of peace and order; and the Chamber of Commerce speedily grew into an organized government.

The Chamber of Commerce of New York has been rendering very much the same kind of service during all these one hundred and forty-four years. It has been giving impetus

[1] Horace B. Claflin, founder of the firm of H. B. Claflin & Co., of New York, and father of John Claflin, president of the Chamber of Commerce in 1912.

and form to public sentiment, the effects of which have been put in operation through the ordinary channels of governmental institutions. The institutions themselves are empty forces, but for the sentiment behind them; and the sentiment behind them is furnished by such men as I see before me here and by such institutions as this Chamber of Commerce. The real government of the country rests with such institutions and the men who compose their membership.

My friends, the noise and excitement of a great presidential campaign is over; the stress and strain, the over-statements, the warping of judgment by personal considerations and by old associations, have passed into memory, and we are all at rest; and during this period of rest, which in this active and vigorous and progressive country must be but short, it seems to be a good time for national introspection.

I have been thinking whether passing beyond and behind all the issues that we have been discussing, we can answer in the affirmative or the negative a crucial question, underlying them all, and that is this: Are we advancing in our capacity for self-government? Are we maintaining our capacity for self-government?

All the rest is unimportant compared with that. If we have the spirit of a true self-governing people, whichever way we decide the questions of the moment, we come through right. Whatever we do about the tariff or about the trusts, or about the railroads, or about wages, or about corporations, or whatever we do about any of the issues before the American people, if we have at heart the true spirit of a free governing democracy we come through right. What is it? What is the spirit of a free self-governing democracy? What are its essentials, and have we them to a greater or a less degree? What is the tendency, is it up or down?

Of course a people to be self-governing must have independence of character and courage; that we know we have.

Throughout the length and breadth of our land the Americans have an attitude in which one recognizes no social or political superior, in which every man knows himself to be a man of equal manhood with all others and has the courage to speak his opinions and to maintain them; and we thank God for that.

But that is not enough; that is not all. All histories of wild and savage people, all the histories of lawless and undisciplined men, all the histories of civil wars and revolutions, all the histories of discord and strife which checks the onward march of civilization and holds a people stationary until they go down instead of going up, admonish us that it is not enough to be independent and courageous.

Self-governing people must have the spirit which makes them self-controlled, which makes every man competent and willing to govern his impulses by the rule of declared principle. And more than that, men in a self-governed democracy must have a love of liberty that means not merely one's own liberty but others' liberty. We must respect the opinions and the liberty of the opinions of our countrymen. That spirit excludes hatred of our opponents. That spirit excludes a desire to abuse, to villify, to destroy. All of us in foreign lands have felt the blood rush to the head, and felt the heart beat quicker, felt a suffusion of feeling upon seeing our country's flag floating in strange ports and in distant cities. That, my friends, is but a false sentiment, unless it carries with it a love not only for the flag but for the countrymen under the flag. True love of country is not an abstraction. It means a little different feeling toward every American because he is American. It means a desire that every American shall be prosperous; it means kindly consideration for his opinions, for his views, for his interests, for his prejudices, and charity for his follies and his errors. The man who loves his country only that he may be free does not love his

country. He loves only himself and his own way and that is not self-government, but is the essence of despotism.

Now as to that feeling I will not say that we have gone backward, but I will say, that there is serious cause for reflection on the part of all Americans.

Our life has become so complicated, the activities of our country so numerous and so vast, that it is very difficult for us to understand what our countrymen are doing. The cotton planters understand each other, the wheat farmers understand each other, the importers understand each other, the bankers understand each other, but there are vast masses of the people of our country who totally misunderstand others of our people, and that misunderstanding is counter to the spirit which I have attempted to describe as so necessary to real self-government.

Misunderstanding! and when I say misunderstanding it implies erroneous ideas; for there are hundreds of thousands of people, outside the great industrial communities, who think you are a den of thieves, and there are hundreds of thousands of people who think that the manufacturers of the country are not better than a set of confidence men. Why, we have before us now great and serious questions regarding the financial problems of the country, and this is what stands in the way of their solution: It is that the men who understand the finances of the country, the bankers, and the merchants engaged in great operations, are under suspicion. Great bodies of people will not accept what they say regarding the subject of finance, a subject complicated by all the currents and movements of finance throughout the world; they will not accept what the experts say, what the men who understand the subject say, because they do not believe their motives are honest. So that the only one who can be heard is the man who does not understand the subject. How are we to reach any conclusion in that

way? On the other hand there are many in this room tonight who way down in their hearts believe that great bodies of the American people really want to destroy their business and confiscate their property, that they are enemies to the men who are carrying on the vast business essential to our prosperity.

Now, neither is true. One misunderstanding leads to conduct which in some respects seems to justify another misunderstanding. Nobody in this country wants to destroy business, wants to destroy prosperity. I say nobody. Of course, there are always hangers-on in every country who would like to destroy everything in the hope of picking up the pieces. But speaking of the great body of the people, they do not want to destroy prosperity; and when they do things, when they vote for measures, when they elect representatives, leading you to think that they want to destroy prosperity, it is because they misunderstand you, and you misunderstand them.

There is nothing more important today, than that, by education and the spread of ideas, such misunderstanding shall be disposed of and done away with, and that all Americans shall come to the spirit of popular government in which every American desires the prosperity and the happiness of every other American, every American naturally feels a trust in all Americans, because they are all his brothers, fellow-inheritors of the great system of constitutional law for the preservation of liberty and justice, of the same great traditions, the same noble ideals of human freedom and human opportunity.

There is one other essential to the spirit of self-government, and that is justice. The manufacturer, the employer of labor, who is unwilling to be just to his workingmen is false to the ideals of his country. The laborer who, in the comparatively new found power of organization, is unjust to his

employer is false to those great traditions in which rests the liberty of all labor.

The willingness to do justice in a nation to every brother of our common land is the ideal of self-government. Further than that, the willingness to do justice as a nation is the true conception of self-government. That rude and bumptious willingness to insult and deride, the result of ignorance, is wholly false to the true dignity and the true spirit of popular self-government.

We are now approaching a question which will test the willingness of the American people to be true to the ideals of self-government and show that a democracy can be honorable and just. Sixty-odd years ago Great Britain and the United States were owners of a great territory extending from Mexico to the frozen north, each with a great seacoast on the Atlantic and each with a great seacoast on the Pacific. It was of vital importance to both that the age-long problem of transit across the Isthmus should be solved; and they went into partnership to support and to stand behind the making of a canal across the Isthmus. They embodied their agreement in what was called the Clayton-Bulwer Treaty of 1850. Well, time passed. Nothing was done, largely, for a long time, because of the French experiment of canal building; until finally a few years ago that partnership was dissolved, and then a new agreement was made under which Great Britain retired from her position, and signed over to the United States all the rights she had under the partnership agreement, with the provision that the canal, when constructed under the patronage of the United States or by the United States, whichever it might be, should be opened and made neutral upon the same terms that were specified in the original agreement, which were that the ships of Great Britain and the ships of the United States should have exactly the same treatment.

Then Panama made to the United States a grant of the use and occupation of a strip of territory across the Isthmus to be used for the construction of a canal in accordance with the terms and stipulations in this treaty with Great Britain. The last session of Congress, however, passed a law which gives free transit to American ships engaged in coastwise trade when passing between our Atlantic coast and our Pacific coast, while tolls are to be imposed upon British ships passing between British ports on the Atlantic and British ports on the Pacific, and upon all other foreign ships. Now, Great Britain claims that that is a violation of the treaty which we made with her and in accordance with which, by express provisions contained in our grant from Panama, we were to build and open the canal. Congress takes a different view of the construction of the treaty, and it has passed this law which Great Britain says violates it. The question is now: What is to be done about it ?

We have a treaty with Great Britain under which we have agreed that all questions arising upon the interpretation of treaties shall be submitted to arbitration; and, while it seems hardly conceivable, yet there are men who say that we will never arbitrate the question of the construction of that treaty; but I say to you that if we refuse to arbitrate it, we shall be in the position of the merchant who is known to all the world to be false to his promises.

With our nearly four thousand millions of foreign trade we shall stand in the world of commerce as a merchant false to his word. Among all the people on this earth who hope for better days of righteousness and peace in the future, we shall stand, in the light of our multitude of declarations for arbitration and peace, as discredited, dishonored hypocrites; with the fair name of America blackened, with the self-respect of Americans gone, with the influence of America for advance along the pathway of progress and civilization,

annulled, dishonored and disgraced. No true American can fail to use his voice and his influence upon this question for his country's honor.

We need to think about these deeper things, more important than anything we have been discussing in the campaign. For, if we are right fundamentally, we will solve all the questions. The spirit of a people is everything, the decision of a particular question is nothing, if we are honest and honorable. If we are lovers of liberty and justice, if we are willing to do, as a nation, what we feel bound to do as individuals in our communities, then all the questions we have been discussing will be solved right, and for countless generations to come Americans will still be brothers, as they were in the days of old, leading the world toward happier lives and nobler manhood, toward the realization of the dreams of philosophers and the prophets, for a better and nobler world.

THE ARIZONA CONSTITUTION AND THE RECALL OF JUDGES

ADDRESS IN THE SENATE OF THE UNITED STATES AUGUST 7, 1911

In the first decade of the century the movement to secure the recall of public officials made its appearance in various sections of the country, particularly in the West. In some cases the judiciary was included, and in the following states the right to recall judicial officers has been adopted up to 1914: Oregon (1908), California (1911), Nevada (1912), Arizona (1912), Kansas (1914).

On June 20, 1910, President Taft approved an act enabling the people of New Mexico and Arizona to form a constitution and to be admitted as states of the Union. In Arizona a constitution was adopted, containing a provision in its eighth article for the recall of public officers, in which judges would be included unless they were specifically excluded. A joint resolution of the House and Senate provided the following amendment to Article 8:

> Every public officer in the state of Arizona, except members of the judiciary, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. . . .
>
> If a majority of the legal votes cast at said election upon said amendment shall be in favor thereof, . . . the governor of said territory shall, by proclamation, declare the said amendment a part of the constitution of the proposed state of Arizona and thereupon the same shall become and be a part of the said constitution; but if the same shall fail of such a majority, then Section I of Article 8 of the constitution of Arizona, as adopted on February 9, 1911, shall remain a part of the state constitution.

On August 15, 1911, the President vetoed the joint resolution because of the provision permitting the recall of judges. Thereupon, a joint resolution passed the Congress and was approved by the President, August 21, 1911 (Stat. at Large, Vol. 37, p. 39, Pub. Res. No. 8), removing members of the judiciary from the operation of the recall, and making the admission of Arizona depend upon the adoption of such an amendment to Article 8 of the state constitution. The amendment was adopted by the voters on December 12, 1911, and on February 14, 1912, the President issued his proclamation admitting Arizona as a state into the Union " on an equal footing with the other states."

Arizona was thus admitted on a footing of equality and on November 25, 1912, it exercised this equality as a state by repudiating the amendment to its constitution exempting judicial officers from recall.

The movement to subject judicial officers to the operation of recall has not made the progress which its advocates expected, and seems to have spent its force.

When the resolution, afterwards vetoed by President Taft, to admit Arizona as a state of the Union, was before the Senate, Mr. Root spoke as follows:

THE act of June 20, 1910, provides for the adoption of a constitution by the people of Arizona. It is further provided in the twenty-second section of the act:

That when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of Arizona, as aforesaid, a certified copy of the same shall be submitted to the President of the United States and to Congress for approval, together with the statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if Congress and the President approve said constitution and the said separate provisions thereof, if any, or if the President approves the same and Congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the governor of Arizona, who shall, within thirty days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the state and county officers.

The act further provides, in section 23:

When said election of state and county officers, members of the legislature, and representatives in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed state of Arizona shall be deemed admitted by Congress into the Union by virtue of this act on an equal footing with the other states.

The joint resolution which is now before the Senate provides:

That the Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States, in accordance with the terms of the enabling act approved June 20, 1910, upon the terms and conditions hereinafter set forth.

"The terms and conditions hereinafter set forth" are, in substance, the requirement that the people of New Mexico shall again vote upon that provision of their proposed constitution which relates to the amendment of the constitution,

and that the people of Arizona shall again vote upon the provision of the proposed constitution which relates to the recall of the officers, including the recall of judicial officers. The provision is that if the people of Arizona, voting upon this clause of the constitution which relates to the recall of judges, shall vote to amend the constitution so as to omit judicial officers from the recall provision, then that amendment shall become a part of the constitution; but if the same shall fail of such majority, then the section relating to recall shall remain a part of said constitution.

It follows necessarily, sir, from the provisions which I have read, that the constitution of Arizona and the provision of that constitution relating to the recall of judges is now before the Senate for its approval or disapproval. No man can say that his vote here fails to commit him to the approval of a recall of judges or to a disapproval of that recall. We have resolved that the territory of Arizona shall be admitted to the Union if the Congress approve the constitution that its people have framed, and only if the Congress approve or if the President approve and the Congress does not approve. The question is squarely and sharply defined. We cannot in our vote upon this joint resolution escape an expression of the position taken by the Congress of the United States upon the proposal that judges shall be liable to recall by a popular vote. What we say here is of little consequence; what we do here is of vast importance to the people of our country and to the development of our system of government.

The Supreme Court of the United States has decided in the Coyle case, the case relating to the right of the people of Oklahoma to change the location of their state capital, notwithstanding the provision of the enabling act which forbade that change, that after a territory has once been admitted as a state, the provisions of the enabling act do not control the action of the state — the court has held that the admission

of the state upon an equality with all the other states of the Union carries with it the power to regulate by constitutional provision and by legislation under the state constitution all the matters which are within the scope of authority of any of the states in the Union. The moment the enabling act is passed, the conditions are complied with, and the proclamation is issued, the power of the national Congress over the great field of local self-control has ended.

In the consideration and action of the Senate upon this joint resolution, we speak the last word that it is competent for us to speak regarding the provisions of the state's constitution. The law of the United States under which this territory is to be admitted has required, and now requires, that the admission shall be only upon the presentation to us of a constitution that we approve. The question before the Senate is: Do we now approve the provisions of the Arizona constitution? If we do, the state will be admitted under that constitution in accordance with the terms of the enabling act; and it will be admitted in accordance with the terms of that act because the constitution has the approval of the Congress of the United States. Are we ready, Mr. President, to approve this provision? If we are, we shall say so by our action upon this joint resolution. If we are not ready to approve this provision of this constitution, we are bound by the law we ourselves have enacted to make that known by our action, and we cannot escape the responsibility for or the consequences of that act.

What is the provision relating to the recall of judges? It is contained in the eighth article of the constitution which is before us for approval or disapproval. The first section of that article provides:

SECTION 1. Every public officer in the state of Arizona holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candi-

dates are elected to such office. Such electoral district may include the whole state. Such number of said electors as shall equal twenty-five per cent of the numbers of votes cast at the last preceding general election for all of the candidates for the office held by such officer may by petition, which shall be known as a recall petition, demand his recall.

SEC. 2. Every recall petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed.

Then follow provisions relating to signatures and statements of the residence of the signers.

SEC. 3. If said officer shall offer his resignation, it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a recall petition is filed, a special election shall be ordered to be held, not less than twenty nor more than thirty days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons, as set forth in the petition, for demanding his recall, and, in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared.

SEC. 4. Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who shall receive the highest number of votes shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office upon qualification of his successor.

To summarize these provisions, sir, they amount to this, that at any time after a period of six months one-fourth of the persons who voted at the last election in the state or in the judicial district may, by signing and filing a petition, deprive any judicial officer of the right to his office which he has secured by his election through the casting of a majority of the votes for him in the election. The effect of that is, that one-fourth of the electors may decree and effect a reconsideration of the election. That is quite independent, sir, of any action by a majority of the electors at the election which is there-

after to be held. The mere filing of the petition by approximately one-half of the men who voted against a judge sets at naught his election, deprives him of his right to the office, and compels him to seek a new title to the office through another election; and in that other election to which he has to submit himself, he has not only to defend his course, to justify his conduct upon the bench, but he has to enter into a contest as against the popularity, the merits, the claims to recognition of one or any number of opposing candidates.

His right to the office to which he has been elected being swept away, he is obliged to go before the people and re-try the question of their preference; it may be as between him and the man he has defeated, or between him and some other possibly more popular candidate, under the penalty of ignominy and disgrace following upon the removed official, if his popularity has waned or a stronger and more popular candidate is nominated against him. That is the tenure of judicial office which this constitution proposes to establish in the state of Arizona, if that state be now constituted by our approval of this provision.

Let me ask the Senate to consider for a moment what will be the necessary working of such a system. We all know that from time to time there arise in all courts cases which enlist great popular interest. Sometimes they are cases in which men are accused of crime and there is a well-founded and general public abhorrence of the crime. I submit to the experience of the members of the Senate the suggestion that the tendency of the public in their abhorrence of a great crime is to assume that the man who is declared by the police authorities to be responsible for it, is responsible, to overlook questions of evidence as to whether he be the true criminal and questions as to the degree and character of his guilt, and to assume that the man who is charged is the man who is guilty. The more atrocious the crime, the more general and

customary is this tendency to condemn a person who is charged with its commission.

Sometimes questions which attract public interest are questions having a political bearing. In our complicated system of government it frequently happens that questions are submitted to the courts upon the determination of which must depend the success of one party or another in establishing its views or in securing the control of the machinery of government. It is but a few days since the courts of my own state passed upon a question as to the validity of the apportionment of the state, and upon their decision rested, perhaps, the question whether one or the other of the great political parties should have control of the government of the state.

Such cases are frequently arising in all of our states, and it frequently happens that there is great public excitement, intense interest, strong desire to have the decision in accordance with the views of political partisans, who naturally consider the view of their own party to be the correct view.

Sometimes such questions arise from the conflict of religious opinions. I have heard it said in this hall today that courts can never pass upon religious questions. Ah, Mr. President, would any Senator say that no court can enforce the provisions of our Constitution in favor of religious liberty ? New sects are continually arising in our country, and the votaries of the religious views of those sects are at the beginning small and insignificant minorities. Questions regarding their rights as religious bodies, questions regarding their rights to freedom of worship and of expression, are protected by the provisions of our constitutions, and against the wish, against the prejudice, against the passion of the vast majority of the people, the courts, and the courts alone, can maintain the rights of the few to pursue the dictates of their own conscience rather than the will of the majority.

Sometimes questions arise upon those limitations which our constitutions impose upon the action of legislatures and executive officers and people alike by those great rules that protect liberty and property against the power of government wherever it be vested.

Now, sirs, picture to yourselves a judge before whom one of these cases is brought. A few people, a single man, is upon one side. The powers of a government are upon the other side. For the few and the weak there stand only the rules of law. Upon the other side stands the public desire to have a decision in accordance with the public interest or the public feeling. Picture to yourselves the judge who is called upon to decide one of those cases, and consider what his frame of mind and condition of feeling must be when he knows that if he decides against public feeling, immediately a recall petition will be signed and filed, and the great body of the people against whose wish he has ruled will be called upon, will be required, to vote whether they prefer him to some man who has never offended public opinion.

Upon all these cases, sir, so far as they depend upon evidence — and a vast majority of them do depend upon evidence — which is produced in the trial and which enters into the record of the case, the public does not see the record. It receives its information from the press. I beg the Senate to recall the reports of trials and arguments in our courts which they have been accustomed to see in the public press. The conditions of newspaper enterprise do not permit the publication of the full record of any trial. The gentlemen of the press, eager to secure items of news that will be interesting to the readers of their papers, catch upon the spectacular and interesting and startling incidents of the trial and reproduce them in their columns.

The judge is to pass upon the evidence that appears in the record, but he is to be judged upon the newspaper reports of

the trial. And to whom, sir, will the judge try that case? To whom will counsel argue that case? What will become of that spirit which pervades every true court of justice, in which the facts as ascertained and the law interpreted and these alone form the basis of judgment? Is it in human nature that a judge, sitting under such circumstances as are exhibited by this provision which I have read, shall do other than try his case rather to the reporters than to his conscience, to his knowledge of the law, and to his understanding of the facts? For at every step the judge is upon trial. His defense will not come when he has the opportunity to put two hundred words of justification upon the ballot. His defense will begin with the first step in the trial of the cause. Human nature cannot work otherwise. In all these great cases of public interest, the judge will be on trial on the newspaper record, and in that trial he will take a far deeper interest than in the trial of the defendant or in the rights of the parties upon the record of the court.

Let me illustrate the way in which this provision is bound to work, by reading from a newspaper called *The People's Paper*, published in Los Angeles, California, Saturday, April 15, 1911. In large black letters:

AROUSED PEOPLE TO RECALL JUDGE

In large, but not so large black letters below:

LOS ANGELES WILL BE FIRST TO USE NEW LAW AND OUST UNION PERSECUTOR FROM THE BENCH

In large black letters, but still not so large:

To recall Judge Joseph Chambers for persecuting union strikers is now the declared purpose of Los Angeles Socialists and union men, who assert that immediately upon the passage of the state recall amendment Chambers will be the first judge in California to receive the attention of an aroused people, determined to oust him from the bench.

The recall petition will set forth that this judge raised the bail of three union men, John Crelly, R. L. Murray, and Isaac Libby, from the usual $50 to the outrageous sum of $300 per man; that the maximum fine for

their alleged offense of picketing is but $50, and therefore in making their bonds six times as large as the highest possible fine, Chambers must have determined to punish the strikers before a jury could have an opportunity to declare them innocent.

Why a judge on the bench, the petition will recite, should have thus made himself an open partisan of the Merchants and Manufacturers Association, can only be explained by the fact that out of the 310 metal trades mechanics, brewery workers, and other union strikers arrested and taken to the police court only four convictions were obtained.

Plainly, the public and jurymen believed these men innocent.

Plainly, the judge concluded that if strikers were to be punished, it must be done before trial.

The petition will then show that the average workingman has little money, as Chambers well knows, and therefore he practically attempted to harass them with imprisonment an unknown number of days in a vile jail awaiting trial by demanding of each striker $300 cash bail.

Mr. President, I do not know whether this recall petition which is outlined there was ever filed. I do not know what action was taken regarding it. I do not know whether the judge was right or wrong in fixing $300 as the amount of bail. But I do not doubt that this paper illustrates, and well illustrates, what will be the inevitable course that will ensue upon the establishment of such a tenure of official office as is provided for by this constitutional provision.

Mr. WORKS. Mr. President, I do not desire to antagonize anything that has been said by the Senator from New York, for I fully agree with the position he takes upon this question, but I do desire to say that there is as yet no law in the state of California for the recall of judges.

Mr. ROOT. I am very glad to hear it.

Mr. WORKS. I desire to state further that in my judgment if the recall did exist in the county of Los Angeles, my home, there would be no danger of the judge referred to in this article being recalled on any such ground as is set forth in the newspaper.

Mr. ROOT. I am very glad to hear that also. As I have just said, I do not know whether any action was taken. It

is evident no action was taken, because the law was not passed; but I have read this paper to illustrate the way in which the recall provision will be regarded by the people who have a deep interest in judicial action; and it is under the pressure of such attempts, if such a provision is adopted, that every judge must administer justice in the causes which excite public interest and public passion. And those are the causes which test the strength and effectiveness of a system of administering justice.

In the year of the Declaration of Independence the temporary legislative body of Massachusetts undertook to frame a constitution for the state, and sent to the different towns of the state a request for their consent to the establishment of such a constitution. On October 1, 1776, the people of Concord, in their town meeting, adopted a resolution refusing to accept a constitution so framed. Among other reasons they said that they refused " because we conceive that a constitution in its proper sense intends a system of principles established to secure the subject in the possession and enjoyment of the rights and privileges against any encroachment of the governing party." That reason applies, sir, whether the governing party be a king or a president or a legislature or the people at the polls. The constitution in its just sense intends to secure the subject in the possession and enjoyment of his rights and privileges against any encroachments of the governing party.

The men who sent back that answer, that they would not accept a constitution framed by the legislature which ought to be restrained by the constitution, were the very men who stood at Concord Bridge and had the courage to fire the first shots against the overwhelming power of England. I trust, sir, I believe, that the spirit of Concord, of 1776, has not died out among the American people, and that they are not yet ready to put the judge, who alone can maintain the rights of

the citizen against the governing party, at the immediate mercy of the governing party. We are not yet ready to say to the judge whom we put upon the bench to maintain the great principles of justice, " You shall maintain them under the penalty of being deprived of your office and being disgraced for life if you oppose the will of the governing body."

Mr. President, I should not oppose the admission of Arizona with provisions in its proposed constitution which were of minor consequence, even though I did not agree with them. There are many provisions in this constitution which I think inexpedient and unwise. There are a number of provisions which I deeply regret to see incorporated in the constitution of any American state. But for all that I would not oppose the admission of Arizona as a state upon a constitution adopted by a vote of her people because it contained those provisions, or because it contained any provision which did not seem to me to be fundamental in its character and to be in a considerable measure a negation of the true principles of our Government.

I conceive that this provision for the recall of judges is of that character. I think it goes to the very basis of our free Government, and I will proceed to state why I think it differs from the other provisions which I dislike. I have no quarrel with the gentlemen who extol the wisdom of the people. I believe that in the long run, after mature consideration and full discussion, and when conclusions are reached under such circumstances as to exclude the interests or the prejudice or the passions of the moment, the decisions of the American people are sound and wise. But, sir, they are sound and wise because the wisdom of our fathers devised a system of government which does prevent our people from reaching their conclusions except upon mature consideration, after full discussion, and when the dictates of momentary passion or self-interest are excluded.

The framers of our Government were largely men who had been bred and had inherited deep religious convictions, and among those convictions was the realization of the fact that among all the virtues that it is incumbent upon men to cultivate and to seek, the virtue of self-restraint stands one of the first. That view of human strength and weakness, sir, lies at the bottom of the religion which we all profess. Whatever be the creed, the denomination, the name underlying the religion of all of us, as it underlay the religions of the framers of our Government, there is the knowledge that we are fallible, prone to evil, weak in the face of temptation, liable to go astray, and that we sorely need to restrain ourselves from the following of our own impulses by the rule of principles — principles of religion, principles of morality, principles of justice. We know that but for some ruling principle we are sure to err, and that our holding to the straight path depends upon our fidelity not to the impulse or the wish of the moment, but our fidelity to the principles that control our lives and conduct.

Many of the framers of the Republic were men who inherited the traditions of a theocratic government, in which men were controlled as against their own impulses and passions by the dictates that were handed down in the revelation from the Divine Ruler. In a belief which we cannot gainsay today, they undertook to establish for this Government a code of fundamental principles of justice, of equality, principles formulated in specific rules of conduct to make practical their application. Those principles we describe as the constitutional limitations of the national and the state constitutions:

No man shall be deprived of his property except by due process of law.

Private property shall not be taken for public use except upon due compensation.

No man shall be compelled to be a witness against himself.

No man shall be twice put in jeopardy for the same offense.

And all the others, that great array of the fundamental and essential principles by which the American Republic has imposed restraints upon itself against its own interest of the moment, its own wishes of the moment, its own prejudice and passion of the moment; that great array of the fundamental rules of justice, of liberty, of human rights, which I say the American Republic has imposed upon itself, is the great secret of the success of the American experiment in government, the maintenance of justice and order, individual liberty and individual opportunity in this vast continent, among these 90,000,000 people. And for the maintenance of those rules of justice our fathers provided that the government which may seek, under the interest or the passion of the moment, to override them, shall be withheld by the judgment of a body of public officers separated from the interests and passions of the hour, with no pride of opinion because of having made a law, with no lust for power because of a desire to execute a law, with a strong hand according to individual opinion as to what may be best; but impartial, sworn only to the administration of justice, without interest, without fear, and without favor. They intrusted the maintenance of these rules to a body of judges, who were to speak the voice of justice without fear of punishment or hope of reward.

It is the establishment of this system of rules, fundamental rules, intrusted for their declaration and maintenance to a body of impartial judges, that is the great contribution of America to the political science of the world, the great contribution of America to the art of self-government among men.

Why, Mr. President, was it necessary to establish these rules of right? Why should there be a provision in our constitutions which prevents the taking of private property for public use without compensation? Why should there be a provision that no man shall be twice put in jeopardy for the same offense? Why should there be a provision that no

cruel or unusual punishment shall be inflicted, unless it be that the existence of such rules was deemed to be necessary and is deemed to be necessary to control the governmental power of the moment ?

The essential difference, sir, between the establishment of one of these great rules of right conduct in a constitution, and the enactment of a law either by a legislature or by a people, is that the fundamental rule is established upon considerations of abstract justice. The rule is established when no one has any concrete interest to be affected, when no one is desirous of doing the wrong thing that the rule prohibits or of undoing the right thing that the rule maintains. It is then that the voice of an intelligent people is the voice of God, when upon considerations of justice, when considering what is right and fair, and makes for justice and liberty, a people establish for their own control and restraint a rule of right; and the abstract rule is necessary because when the concrete interest comes into play, because when the passion of the moment comes into play, because when religious feeling is rife, when political feeling is excited, when the desire for power here or the desire to push forward a propaganda of views there comes into play, then the inherent weakness of human nature makes it certain that the great and fundamental principles of right will be disregarded.

Sir, we see every day legislatures of our states passing laws which are in violation of these fundamental rules. We see every day public officers exercising an arrogant power in violation of the fundamental rules, except as they are restrained by the cold and impartial voice of those tribunals that our people have established to assert the control of the principles of justice over the interests and the passions of the moment.

Mr. President, this provision for the recall of judges strikes at the very heart of that fundamental and essential character-

istic of our system of government. It nullifies it; it sets it at naught; it casts to the winds that protection of justice that our fathers established and that has made us with all our power a just and orderly people. For, sir, when we say to the judge upon the bench, who is bound to assert the rules of justice established in a constitution long years before for the restraint of the people in their passion or their prejudice, you shall decide for the rules of justice at your peril; when we say to the judge, if you maintain the abstract rule of justice against the wish of the people at the moment, you shall be turned out of office in ignominy, we nullify the rule of justice and we establish the rule of the passion, prejudice, and interest of the moment.

So, sir, I say that this provision of the Arizona constitution strikes at the very heart of our system of government. It goes deeper than that. This provision, sir, is not progress, it is not reform; it is degeneracy. It is a movement backward to those days of misrule and unbridled power out of which the world has been slowly progressing under the leadership of those great men who established the Constitution of the United States. It is a move backward to those days when human passion and the rule of men obtained rather than the law and the rule of principles; for it ignores, it sets at naught the great principle of government and of civilized society, the principle that justice is above majorities.

I care not how small may be the numbers of a political faith or a religious sect, I care not how weak and humble may be a single man accused of however atrocious a crime, time was when the feelings and the passions and the wish of a majority determined his rights and oftentimes his right to life; but now, in this twentieth century, with all the light of the civilization of our times, after a century and a quarter passed by this great and free people following the footsteps of Washington, Hamilton, Jefferson, and Madison, now with all the

peoples of the world following their footsteps in the establishment of constitutional governments, the hand of a single man appealing to that justice which exists independently of all majorities has a power that we cannot ignore or deny but at the sacrifice of the best and the noblest elements of government.

There is such a thing as justice, and though the greatest and most arrogant majority unite to override it, God stands behind it, the eternal laws that rule the world maintain it; and if we attempt to make the administration and award of justice dependent upon the will of a majority, we shall fail, and we shall fail at the cost of humiliation and ignominy to ourselves.

I do not envy the men who prefer the uncontrolled rule of a majority free from the restraints which we have imposed upon ourselves, to the system of orderly government that we have now established. I do not envy the men who would rather have the French constituent convention, controlled by Marat and Danton and Robespierre, than to have a Supreme Court presided over by Marshall; who would rather have conclusions upon a question of justice reached by a popular election on the basis of newspaper reports than to have the impartial judgment of a great court. I do not envy the men who have no sympathy with Malesherbes and De Sèze pleading for the lawful rights of Louis XVI against the dictates of the majority of the French capital in 1793.

I do not envy the men who see nothing to admire in John Adams defending the British soldiers against the protests of his neighbors and friends and countrymen, after the Boston Massacre. Rather, sir, would I feel that my country loves justice and possesses that divine power of self-restraint without which the man remains the child, the citizen remains the savage, and the community becomes the commune; that my country has carried into its system of law, and, whatever be

its wish for the moment, whatever its prejudice, whatever its passion for the moment, will forever maintain as of greater importance than any single issue or any single man or any single interest; that reverence for the eternal principles of justice which we have embedded in our fundamental law as our nearest approach to the application of the divine command to human affairs.

THE RECALL OF JUDGES

REMARKS IN THE REPUBLICAN STATE CONVENTION AT ROCHESTER, APRIL 10, 1912

At the New York State Convention, held at Rochester, N. Y., April 9–10, 1912, the following, among other resolutions, was adopted:

> We oppose the recall of judges or any system which will introduce cowardice as an element in the administration of justice. The authority of the judiciary should not be impaired. Respect for the courts once broken down, the constitutional protection of the liberties of the individual would be destroyed.

Upon this resolution, dealing with the recall of judges and of judicial decisions, Mr. Root spoke as follows:

I HAVE risen to second the resolutions reported by your committee, but I shall confine what I have to say to a single subject treated in this series of resolutions, the subject which covers the attempt to interfere with the independence and destroy the authority of the judicial department of our Government.

I confine myself to this because I regard it as of overshadowing and overwhelming importance. We may change our tariff laws, and if we are not satisfied with them we may change them again. We may change our method of nominating officers, and if the system does not work right we can change it again. We can change our method of electing officers and change it again. All the ordinary laws which affect the conduct of business and the relations of men to each other and the powers of government in general may be changed and rechanged to suit the developing feelings and interests and opinions of the people; but the duty of submitting our will, whether it be the will of the individual or the will of the greatest majority that ever gathered at the polls, to the eternal principles of justice, that can never be changed without the degradation of the people who reject it.

The founders of our Republic were wise men in more ways than one. They understood history and the philosophy of government, and they understood human nature. They were students and they were men of affairs, and they founded our Government upon two basic propositions, upon two underlying truths. One of them was the truth that you and I learned in our childhood, for we came of a God-fearing people as they did. We learned and we should not forget that our natures are weak, prone to error, subject to fall into temptation and to be led astray by impulse. All the history of religion, of morality, of government, all the history of man, teems with universal and overwhelming proof of this great truth, upon a recognition of which our civil society rests. They knew, too, that men are no more perfect in the mass than they are as individuals. They knew that indeed when men come together or act in great bodies free from the sense of personal responsibility, they will often do things that they would shrink from doing as individuals. The party whose vitality has brought us here was founded upon resistance to the spread of that doctrine under which vast majorities, overwhelming majorities in the states covering nearly one-half of our land, majorities composed of men as true, as honorable, as noble, as live in America, or anywhere on earth, united in holding millions of black men slaves. The life of the Republican party was a protest against that rule of the majorities in the South. We live as an organized protest against the majorities that defy the rule of justice. One other great fundamental principle they based themselves upon, and that was that there is only one way in which man can control his own tendencies to error, and that is by the recognition, the adoption and the enforcement upon himself of declared principles of right conduct. So throughout the history of the world the assertion of

principles to govern men and to restrain their impulses has been the method of advance in morality, in social conditions, in civilization. Principles inculcated by religion, principles of social honor, the violation of which is visited by the community with penalties more terrible than the prison and execution, declared principles of action, sometimes enforced by a superior from above, sometimes enforced by intelligent self-control, are the only antidote, the only remedy, the only preventive for that yielding to impulse which today makes the people of Mexico one tumultuous mob, devastating that fair land which had taken so many forward steps under the rule of law and order along the pathway of civilization.

Upon these two foundations our Government was based, and for that imposition of rules of conduct that formerly came from a monarch, our fathers substituted the imposition of rules of right conduct by the people, upon themselves. They put the declarations of principle into our organic laws in colonies, in states, and in the nation, and we call them constitutional limitations. There is prejudice in some minds against the discussion of constitutional limitations, because lawyers become dry and tedious and narrow and technical in discussing them; but they are the declaration of those principles of eternal justice upon which civilization rests, set up by the people for their own guidance. They are a covenant between all the people, and every man, every woman and every child in the state. They are a covenant between arbitrary and overwhelming power and the weakness of the individual. These constitutional limitations are necessarily established in the abstract. They are impersonal. They are the rules of action which are established when men have no particular interest at stake. They are the rules of action which are established when there is no strong desire to do injustice. Universal and impersonal, they constitute

the nearest approach that humanity has ever made to putting into human law the divine rules, conformity to which is the requisite of a Christian civilization.

These limitations cannot be enforced except by having some one who shall say whether a particular action that they design to restrain does violate them or not; and in order that that may be determined, in order that the line may be drawn, our fathers established the judicial system in which there should be placed judges impartial, upright, free from any complicity in the interests that came before them, who should do justice in accordance with these declared principles, to rich and poor alike, without fear or favor or hope of reward. Upon the independence and the authority of those judges depends the perpetuity of this system of restraint upon ourselves, which is essential to the prevalence of justice and the continuance of our free institutions. Now if you undertake to say to a judge that if he decides against the popular will that finds itself restrained by the declaration of one of these principles of conduct under the Constitution, he shall be recalled, you make a coward of him. It is not in human nature that judges shall hold the scales evenly when they know that by making an unpopular decision they themselves will be the sacrifices. It will introduce the rule of cowardice in place of the rule of courage. It will introduce the rule of time-serving in place of the rule of fearless justice. It will introduce the rule of the force of the great body of the people instead of the rule which protects the weak individual against all the people. And so, with the proposal that the people shall pass by vote upon the decisions of the judges as to constitutional questions; that means that wherever a constitutional limitation has been established to prevent the people from doing injustice, when it comes to the point of action, they themselves shall determine whether they will be restrained by it or not in the particular case

where the injustice may be done. These rules must be kept impersonal, abstract, universal, in order that they may restrain and guide action in each particular case. It is so that just men rule their own conduct. They do not make up their principles as they go along, accordingly as they wish to do this or that or the other thing. They determine their principles and then they direct their conduct and restrain their wishes by making them conform to the principles they have adopted beforehand.

These fundamental bases of our Government do together assert and set up as the great pivotal principle of national conduct, the proposition that there is such a thing as justice that is above majorities and is independent of popular will. All the votes in America cannot make injustice, justice. It is impossible that any two beings should be created anywhere in this universe and come into life without being subject to the eternal law that requires just conduct by them toward each other. Abraham Lincoln in the first Inaugural described the true character of our Government. He said:

> A majority held in restraint by constitutional checks and limitations and always changing easily with deliberate changes of popular opinion and sentiment, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Aye, whoever rejects the order of a majority acting within the restraints of these eternal principles declared in our Constitution, flies of necessity to anarchy or despotism, and whoever breaks down the restraints of these eternal principles upon the majority flies of necessity to anarchy or despotism. All these other matters are of little consequence, for this is the fundamental matter. This is decisive. It is along this line that the progress and development of our country has won its way. You may change it; you may depart from this old standard of justice enforced by an independent judiciary, as God's people many a time have turned their

faces away from Him. You will not see the difference at once, not today, not tomorrow, or for many morrows; but the paths will surely and steadily be diverging; one pathway is the pathway of the decline and fall of nations and it leads of necessity to anarchy or despotism. The other pathway is the glorious one upon which our country, with its Constitution declaring the everlasting principles of divine law, has proceeded in its majestic course of advancing civilization, leading the world in winning for all mankind, rich and poor, high and low, the inestimable privilege of liberty, with order, preserved by justice.

THE ADMINISTRATION OF JUSTICE

SOME DUTIES OF AMERICAN LAWYERS TO AMERICAN LAW

COMMENCEMENT ADDRESS BEFORE THE YALE LAW SCHOOL
NEW HAVEN, JUNE 27, 1904

IN this country of common opportunity for exceptional success no career opens so many and such varied pathways to great usefulness and to fame and fortune as does that of the lawyer. The conditions precedent to a lawyer's success are severe. He must acquire sound learning; he must be trained to clear thinking and to simple and direct expression; he must be both intellectually and morally honest; and he must have the quality of loyalty to every cause in which he enlists. He should have the tact which comes from real sympathy with his fellow-men, and he will be far better for the saving grace of a sense of humor, which brings with it sense of proportion and of good judgment.

The lawyer who exercises these qualities is certain of professional emoluments greater than those received by the members of any other profession, old or new. But he is certain of far more than this. As he goes on in life a multitude of personal relations grow up between him and his clients. Some of these clients are strong and able, and with them the relation is of mutual respect and helpfulness. Others are weak and dependent, and to them he furnishes not merely learning, but support and strength of character and moral fiber. The feeling of all is characterized by confidence and trust. The growth of his own character responds to the requirements of this esteem. In time other people come to feel and to adopt to a great degree the opinion and attitude of the clients who know him best. And so he rounds

out his career in possession of that priceless solace of age — the respect and affection of the community which makes up his world.

The faculties of such a lawyer are exercised in a wide variety of affairs. Today, preparation for the trial of a cause requires him to become familiar with the history and methods of a great manufactory, the sources and cost of its raw material, the markets for its finished product, the elements of its success or failure, the difficulties and hopes and fears and ways of thinking of its managers. Next week he may go through the same process with a railroad company, and the next with a banker, and the next with a merchant, or a ship owner, or a contractor, or a charitable institution, or a church. Men looking at life from all points of view and with all sorts of prejudices come to him in turn, and he has to put himself in their places and get their angles of vision in order to apply his own sense of proportion to their affairs and advise them justly. The lawyer thus naturally tends to avoid the running into a rut of narrow experience and activity, which makes so many men who are able in their own particular business worthless for anything else.

It frequently happens that the capacity cultivated by this variety of experience and the opportunity for its demonstration bring to the lawyer some prize of business life and take him out of the general practice of his profession altogether. Among the men whom the seniors of our bar remember as trying small causes many years ago are to be counted now heads of great banking houses of world-wide influence, of great railways, and of great mining and manufacturing and constructing enterprises.

More important is the adaptation for public office which results from the variety of a lawyer's experience and training. The study and exposition of existing laws, of course, tends to qualify men to be makers of law, and to a less degree to

administer the law. The lawyer's habit of speaking and of thinking on his legs is useful in a legislative body. The capacity to get the sense of a document in the shortest possible time, and the faculty of rapid decision — both of which are so necessary in court — are useful in an administrative office. But I think the chief reason why so many lawyers tend naturally to public office is that every public office is quite different from any private business, and it is much easier and more natural for the lawyer with his varied experience and his habit of transplanting himself frequently from one set of interests and ideas to another, to meet the different requirements of public office, than it is for any other member of the community. For this reason, or for all these reasons put together, the people in our country turn more frequently to lawyers for the performance of public duties than to any one else; and our government is largely carried on by them. The profession of law, therefore, affords the most promising route to high office not merely upon the bench but in the legislative and executive branches of government.

In all these relations the lawyer can, if he will, exercise a powerful influence over the thought and sentiment of his community. His quasi-public employment makes him a conspicuous figure. Every interesting case in which he is engaged advertises his name, and it becomes known to the public. He can greatly aid all good causes, and do much to restrain or move public feeling and public judgment.

All these opportunities carry correlative obligations. The confidence of clients and of the community, the familiarity with affairs, the wide acquaintance with men, the knowledge of the law and its working and of the principles upon which it is based, the intimate connection with business enterprises, the large share in the government of the country, impose upon the member of the profession in America special responsibilities for the preservation and systematic development of

the social and political system in which the legal profession plays so great a part.

He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which come from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds.

The institutions upon which the lawyer's opportunities are based have not come of themselves; they are the product of the convictions, the efforts and the devotion of our predecessors. They are not indestructible; they are liable to pass away as many times before human institutions have passed away, to be known only in history. They will continue only so long as they have the faith and loyalty of the people who live under them and believe in them and are willing to conform to them because they believe in them. The real force of law as a continuing rule of action is derived from the assent of the people for whom the rule of action is prescribed. Without real assent on their part to the justice and expediency of the law it soon becomes powerless and ineffective. It is a matter of common observation that statutes which run counter to the deliberate sense of the community for which they are provided fail of execution and fall into disuse, as for example, the laws relating to the sale of intoxicants in some of our large cities; that when in the course of time the moral

standards of a community change, laws which have once satisfied the moral sense of the people but have come to be no longer in conformity to the changed standard, become obsolete and impossible of execution, — as for example, the so-called "blue laws" of Connecticut; that when laws do not conform to the judgment of a community as to what is a just and reasonable regulation of the conduct of its members toward each other, there is a constant tendency toward the establishment and enforcement of new and different regulations, even without formal legal sanction, to take the place of the formal but rejected and ineffective rules, — as in the case of the treatment of the crime of horse-stealing upon our western frontiers, and in the case of the marriage laws of Cuba and Porto Rico, which resulted in a large part of the population living in marital relations not sanctioned by the law prescribed by the sovereign, but sanctioned by customary law of the people under which without reproach the home was maintained and the family was reared under marital fidelity and parental responsibility.

No doubt is thrown upon this principle by the fact that very bad and oppressive laws have been for long periods enforced by superior power among peoples who had not yet conceived the idea that they themselves were the true source of authority. The assent of such people to the right of superior authority to impose laws upon them is in effect an assent to the law which is imposed by that authority, however much it may differ from their judgment and wish.

It is of little consequence that any particular law fails of effect for want of public assent, except that each instance of disregard of law tends to weaken respect for law in general. But the same inexorable rule applies to the fundamental principles which underlie systems of law. If they come to be without the genuine assent of the people to their justice and expediency, they also will fail of effect; a system founded

upon them will fail, and a general structural and institutional change will take place. If our people were to revert to the views of individual liberty which prevailed in Spain under the rule of Philip II on the one hand, or were to give their adherence to the opinions concerning the right of property preached by Karl Marx and Lassalle on the other hand, the constitutions which express the principles underlying our institutions and our laws would become dry husks with no more life in them than the laws of the Medes and the Persians. We believe that those principles are founded in eternal justice, and that in the development of civilization the whole tendency is toward them and not away from them; but communities, like individual men, often wander. The path of departure from true principles always proceeds by gradual and unobtrusive divergence. There are comparatively few who appreciate the value and importance of a rule, as distinguished from justice in a particular case. The great rules of right established in our constitutions were of impersonal and impartial origin. As Ulysses bound himself to the mast while still without the influence of the sirens' song, our fathers bound themselves and their successors by constitutional limitations against future temptation to violate principles of justice under the pressure of special occasion. Like Ulysses, when the temptation comes we struggle against the restraining bands. Now some sudden gust of popular feeling, now widespread and insidious appeals by some great private interest, now the requirements of immediate political party exigency, press against the limitations. Then some men say, and more men think: Why should the criminal go unpunished because of the technical form of old rules? Why should profitable and fair action be hindered by the fine spun theories of old lawyers? No legislative body meets in this country which does not give at least its theoretical assent to the principles of the Constitution; but it is probably safe to

say that not a legislature meets which does not spend much of its time in trying to evade those principles. Always that great part of the people who are dissatisfied with their lot, those who assume that all the ills of life can be remedied by law, and those who resent the differences of condition which result from differences of individual capacity, continually question the justice of the system under which others seem to be richer, happier, more privileged than they.

No mere *vis inertiæ* of the statute book will resist this pressure. No indifferent and unbelieving people will maintain these great rules of right in living force. They can be maintained only by a people who believe in them, and who hold them to be the bulwarks of their possessions, of their liberty, and of their individual opportunity, who esteem them above all private interest, and are earnestly determined to enforce them.

To preserve and foster such a living faith of the people in the supreme value of the great impersonal rules of right which underlie our system of law, is the highest and ever-present duty of the American lawyer.

The features of our system of law which it is specially important to preserve inviolate are not to be found in the general body of municipal law which regulates the relation of members of the community to each other. The oft-quoted declaration of Lord Coke that " the common law is the perfection of reason " leaves the student of the law as it was in that famous judge's time still at liberty to question the perfection of human reason. It is so in our own time. We have no just ground for arrogating to ourselves any special superiority over the other civilized nations of the earth, either in the system of rules which declare and regulate the rights and obligations and the conduct of men towards each other, or in the methods of procedure by which those rules are enforced. Substantially the same principles of right con-

duct and fair dealing among men obtain in all civilized nations, and each country has produced a system of law, more or less original to itself, suitable for the application of these principles to the customs, habits, modes of living, and business ways of its own people. The utmost that we can say with confidence regarding the system which has grown up in England and America is, that it is better adapted to our ideas and our ways of thinking and acting than any other system.

No part of the duties imposed upon the Government of the United States in the exercise of authority over the islands yielded or ceded by the Treaty of Paris,[1] with their millions of inhabitants, called for more study and consideration than the solution of the question how far and in what direction the system of laws under which the people of the islands had lived should be changed or modified under the new authority. There were those who thought it our duty immediately to give to the people of Cuba, of Porto Rico, and the Philippines the blessings of the common law. A careful study of the subject, however, soon led to the conclusion that these people already had in force an admirable body of municipal law, regulating their rights and obligations, and far better adapted to their needs than the system of rules which we prize so highly for the guidance of our own conduct. Certain constitutional principles needed to be established: the laws relating to crimes and punishments, and the methods of criminal procedure which had been adopted and had been used for purposes of oppression, needed to be changed; but the great body of municipal law which regulated the relation of people to each

[1] The treaty of peace, signed at Paris, December 10, 1898, between the United States and Spain, whereby Spain relinquished all claim of sovereignty over and title to Cuba; ceded to the United States the island of Porto Rico and other islands then under Spanish sovereignty in the West Indies and ceded to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within a designated line, and the island of Guam.

other was far better for them than anything we could produce out of our experience; and it was left, and properly left, substantially unchanged. Practically the same course was followed by the very able group of men who undertook the task of adapting the laws of Louisiana to the new conditions following the cession of that territory to the United States by Spain. A similar course was followed after the acquisition of Lower Canada by the English in 1763. That province had been governed by the laws and ordinances of France and the custom of Paris — a mingled system of Roman and Frankish law. By the statute of 14, George III, the English law was introduced in criminal matters, and the civil law was left undisturbed.

The rules which constitute such a body of law change from age to age with changing conditions and opinions. Much that was deemed essential in Coke's time seems to us now artificial and absurd. Much that we deem essential now will doubtless become obsolete and be brushed aside by our successors.

There is no part of our system of procedure to which we adhere with a greater degree of intolerance of the different methods followed in other countries, than the rules governing the production of evidence in the trial of causes. Yet in a recent case involving the effect to be given to a foreign judgment, a very learned and able Federal judge made the following observations:

> The methods of investigation in different countries are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all *indicia* of the truth which do not fall within the class of those it regards as competent and safe, while in continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say

nothing about the weightier matters of law, the wisdom of yesterday is the folly of today; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that of France; or that a French citizen, sued here, could not as justly complain of our rules of evidence, or of a bill of discovery which compels him to exhibit his case in advance to his adversary, as one of our citizens sued in a French court could of the methods of procedure there ?[1]

And upon this proposition he had the subsequent approval of the Supreme Court of the United States.[2]

In all this field of the law regulating the relations of citizens to each other, the proper function of the lawyer is to promote rational progress; to maintain stability against all fads and crude innovations and at the same time to keep the development of the law moving with equal step abreast of the progress of the age, satisfying the moral sense of the time and meeting the changing conditions of human life and activity. Lessons are to be learned from other countries. Practical common sense is to be applied to outworn rules. Wrong constantly assumes new forms and adopts new methods, and the spirit of the law must answer with new expression and remedy. The law always tends to become fossilized; procedure always tends to become technical and complicated; eternal vigilance and ever-recurring reform are the price of efficiency. The obligation to lead in these rests first upon the lawyer.

When, however, we turn to the American law which regulates the relations of government and the agents of government to the private citizen, we find a class of rules which it is essential to preserve inviolate in full force and vigor; and as to these we cannot for a moment admit superiority or

[1] The case referred to in the text is Hilton *v.* Guyot, decided by the Circuit Court of the United States for the Southern District of New York in 1890, by the Honorable William J. Wallace as Circuit Judge; the extract quoted by Mr. Root is from Wallace's opinion (42 Fed. Rep. 249, 253).

[2] Hilton *v.* Guyot (1894) 159 U. S. 113.

equality of merit in any system which does not embody them and make them effective.

We need not concern ourselves especially about the mere declarations of the general principles of justice and liberty. Most nations profess adherence to those principles. The first French Republic easily led the world in fine words about liberty, equality and fraternity, accompanied by the most appalling violation of every human right. The most sadly misgoverned republics of South and Central America live under constitutions which have copied, with various improvements of style, the most admirable passages of the Bill of Rights. The most flagrant usurpations of power, and the most despotic denials of private right in modern times have been accomplished in avowed furtherance of the same general principles of liberty which we profess.

But we have a class of secondary provisions designed to give to the private citizen the practical benefit of the general principles of liberty and justice, and that we should hold to these is all-important and essential. These provisions seldom themselves declare the principle to which they are designed to give effect. They secure to the individual citizen certain specified statutory rights, the reason for which is not always apparent on the surface; and it frequently happens in individual cases that the assertion of these specified rights appears to the public to be technical and contrary to the justice of the case. Yet unless rules of law securing these specified rights are maintained inviolate, the general principles which we profess are not practically available for the protection of any citizen. The declaration of a principle in favor of liberty is no protection to your liberty and mine without the secondary provisions requiring judicial officers to allow writs of habeas corpus or some equivalent specified definite right in the course of procedure. Spain professes as high a regard for the principles of liberty as we do. Yet in 1899 we found hundreds

of prisoners in the jails of Cuba who had been imprisoned for years without trial for want of some definite and certain way in which they could avail themselves practically of the principle. One of these wretches had been imprisoned for eleven years theoretically awaiting trial. General declarations in favor of fair, impartial and speedy trial for persons accused of crime, are worthless without specific provisions enabling the accused to require that he be brought to trial or set free, that he be acquainted with the evidence against him, that he be confronted with the witnesses against him, that he have process for the production of his own witnesses, that he be protected in refusing to testify against himself, and that he have counsel for his defense. General declarations of the inviolability of contracts are worthless without specific provisions enabling the individual citizen to bring to the test of judicial determination the question whether legislative acts do impair the obligation of contracts in which he is interested, and requiring all courts and public officers to treat as nullities legislative acts which are adjudged to impair such obligation. This class of specific and definite provisions of a secondary nature is the sole protection of the individual citizen against the arbitrary exercise of the tremendous powers with which the agents of government are invested. The fact that this power of government is derived from the people is no certain protection for the individual. In conspicuous cases to which public attention is attracted public opinion may compel a just exercise of power; but in the rush and complication of our crowded life the affairs of the poor and humble, who most need protection, are but little noted, and injustice visited upon them brings no immediate penalty. Because of the fact that these secondary rules do not themselves declare a principle, that many of them appear to be technical, that many of them appear to be mere rules of procedure and of evidence, that occasionally their assertion does not appear to promote

the justice of the particular case, — they are often regarded with disfavor by the thoughtless. If the agents of government are permitted to override these rules when they think justice in the particular case requires it; if the rule is not to be maintained as a rule inviolate in every case, then there is nothing left but the judgment of the officer in every case, and the protection of all citizens alike against arbitrary power is swept away. One of the great Chicago daily newspapers a few weeks ago published the fact that a defendant in a criminal prosecution had secured a writ of habeas corpus, and observed that he would doubtless continue to obstruct the proceeding by similar technicalities. If the editor of that journal were unjustly accused of crime and kept *incommunicado* for a few weeks he would change his opinion regarding the character of the writ of habeas corpus. Yet in carrying to the minds of his readers the idea that he expressed concerning that great writ of right, he was weakening the safeguards of his own liberty, and of the liberty of his children after him.

In no country and in no age have the practical provisions of law designed to secure to the private citizen the application of the principles of liberty and justice for his protection against official power, been made so broad, so effective and adequate as in the countries following the course of the common law and inspired by the Anglo-Saxon ideas of personal liberty and property rights. These practical rules are the most invaluable part of our national inheritance, and in some most important respects they have been made more adequate and secure here than in any other country. Upon their preservation in living force depends the whole structure of our free government. They can be preserved only by intelligent appreciation of their value on the part of the people of the United States. It is the duty and the privilege of the lawyers of the United States to promote such an appreciation among all our people; to educate each successive generation to a

knowledge of the reasons why these provisions were adopted and why they should be jealously guarded against all assault.

There is one general characteristic of our system of government which is essential and which it is the special duty of lawyers to guard with care — that is, the observance of limitations of official power. This observance can be secured only by keeping alive in the public mind a sense of its vital importance. There is a constant tendency to ignore such limitations and condone the transgression of them by public officers, provided the thing done is done with good motives from a desire to serve the public. Such a process if general is most injurious. If continued long enough, it results in an attitude of personal superiority on the part of great officers which is inconsistent with our institutions, a destruction of responsibility and independent judgment on the part of lower officers, and a neglect of the habit of asserting legal rights on the part of the people. The more frequently men who hold great power in office are permitted to override the limitations imposed by law upon their powers, the more difficult it becomes to question anything they do; and the people, each one weak in himself and unable to cope with powerful officers who regard any questioning of their acts as an affront, gradually lose the habit of holding such officers accountable, and ultimately practically surrender the right to hold them accountable. The countries which have been governed by Spain as colonies, or have derived their systems of law from Spain, have afforded many examples of the injurious effect of such a process. It has been a common practice in those countries to provide against failure in duties on the part of subordinate and local officers not by holding these officers directly responsible to the people or the sovereign, but by vesting in the officers of higher grade rights of " supervision, intervention and control," to be exercised when necessary; and the result in such cases has been practically unlimited

control by the superior officer exercising the power at will. The ultimate effect upon the people governed is a concession to the superior officer of the general right to control their conduct and an absence of the idea of personal independence. The people of a Philippine township assume as a matter of course that they are bound to do what the *presidente* of the town tells them to do. They submit themselves to his orders, and the idea that within certain definite limits prescribed by law he has authority and that beyond those limits he has none and they are not bound to obey, has no reality for them. They will require a long course of education and training to enable them to grasp and act upon such an idea. The absence of this conception is the chief obstacle to the attainment of capacity for self-government by the Filipinos. No community which has not that conception in force and effect can maintain the type of independent manhood necessary to self-government. Another illustration of not insisting upon limitations of official power is to be found in the frequent irresponsible dictatorships in Central and South America. The practice of providing against local disturbances by conferring upon the executive, authority to suspend constitutional guaranties, has times without number resulted in those countries in the executive's sweeping away at will all limitations upon his power and becoming an absolute dictator. Constitutional limitations upon legal power in such countries come to be regarded as but formal matters to receive attention only when it suits the will of the officer upon whom the ineffective and illusory limitations are imposed. A few years ago a South American republic elected a president and a vice-president under a constitution which provided that when the president was absent from the capital the vice-president should fill his place, and which further provided that when public order was disturbed the president might proclaim that fact and should thereupon have power to issue decrees having

the force of legislative enactments. The vice-president soon became tired of being only vice-president, and securing the adherence of the soldiers in the vicinity he seized the person of the president and put him in jail a few miles from the capital. Thereupon he proclaimed that the president being absent from the capital, he (the vice-president) assumed executive functions. Having thus attained the presidency, he issued a further proclamation that public order was disturbed (as indeed it had been by his own act), and thereupon he assumed as chief executive the exercise of legislative functions. For years the people of that country, which called itself a republic, submitted to be governed by this usurper who had thus followed the forms and violated the spirit of their constitution. The people had grown accustomed to official disregard of the limitations imposed by law upon official power. It is not in this way that liberty can be preserved. Constant accountability of public officers for strict observance of the limits imposed by law upon the exercise of the great powers vested in them, and customary and undoubting assertion of the private right of the citizen to have no power exercised over him except in strict accordance with the letter and the spirit of the law: these are the essential conditions of free government and personal independence. The exercise of power not conferred by law may in a particular case destroy no man's property nor restrain his liberty; but it weakens the title to every man's property and injures every man's liberty, because it is one step in a process which if continued would be destructive of our free institutions.

Abundant evidence that our people have not become indifferent to these necessary limitations is furnished by the frequency with which political opponents impute disregard of them to public officers. The charge is often unfounded and often made upon slight foundation with great exaggeration. But the fact that it is made, shows that political leaders, who

make a business of studying public sentiment, recognize that if they can make the people of the country believe that a public officer has usurped power which does not belong to him, he will be condemned without regard to the motives of his action. The cries of emperor, czar, and man-on-horseback, are but extravagant appeals to an instinct which ought to exist and happily does exist among us, against submission to unlawful authority however trifling may be its exercise and however beneficent its despotism.

The extravagance and lack of foundation for many of these appeals, however, involve a danger which should not be ignored. It is, lest the cry of wolf should be heard so often that men will become incredulous and indifferent and turn a deaf ear to statements and proofs of real encroachments, made with moderation and not for political effect, and that thus, as so frequently happens, indiscriminate and unfounded charges against the innocent shall serve as a protection to the really guilty.

No one is so well fitted as the lawyer to ascertain the true limits of official authority, and no one can do so much as he, to form public opinion regarding this class of questions, upon the lines not of partisan political advantage, but of independent and impartial judgment. Upon the exercise of this kind of judgment by the people depends that effective service by public officers which comes from the feeling that they will be sustained in the full and courageous discharge of their duties within the limits of their authority, and the preservation of the independent spirit which will always without violence or conscious effort hold officers to strict accountability whenever they transgress those limits.

You gentlemen who are about entering upon the profession of the law will argue many causes to be recorded in judicial reports. You will construe and apply and take part in making many statutes. You will assert personal rights and pro-

tect individual liberty and individual property. Many of you will hold public office. Some of you will play a conspicuous part in the government of your country. Do not, I beg you, forget that all the statutes and the constitutions upon which they are based, all the judicial reports and the judgments which they record, are worthless, are but empty and meaningless form, without efficacy for peace or order or justice or liberty, except as constitutions and laws and judgments truly interpret the judgment and moral sense of the whole people who govern and are governed. You will strive for your clients in many courts; but it will be your high privilege to strive also for the law itself, in the great forum of public judgment. There you may use all your opportunity, all your learning, all your experience, in pleading with the people of our country for the perpetual life of the great rules for the protection of property and liberty, which underlie our institutions, and which only the governing people can keep alive in our land.

THE REFORM OF PROCEDURE

PRESIDENTIAL ADDRESS AT THE ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION SYRACUSE, JANUARY 19, 1911

THE bench, the bar, and the public agree that there is undue delay in our judicial proceedings. A considerable number of able and public-spirited lawyers, including several committees of this Association and the local bar associations of this state, have addressed themselves to the work of devising amendments of the law which should make our procedure more swift and certain in reaching the ends of justice. They have made many suggestions of great value looking to changes in the code of procedure. Some of these have been adopted, and there are pending some the adoption of which would be of material advantage.

It is not my purpose, in selecting the reform of procedure as the subject for the remarks which seem appropriate on the part of a presiding officer, to discuss these suggestions or to offer others relating to the details of the code. I wish rather to emphasize the general principle which we will all agree ought to control the acts of the state in dealing with this subject. The principle is, that procedure should be made as simple as possible. The fewer statutory rules there are to create statutory rights intervening between a citizen's demand for relief and the court's judgment upon his demand, the better. The more direct and unhampered by technical requirements the pathway of the suitor from his complaint to his judgment, the better. It seems to me that we have reached a point in our practice where the application of this principle requires very thorough and radical action:

that mere improvement of the code of procedure in its details will not answer the purpose.

The original Field Code of Procedure of 1848 contained 391 sections and was comprised in 169 of the small, loosely-printed pages of the session laws of that time. The last edition of our present code at which I have looked contains 3,384 sections, a large proportion of them dealing with the most minute details. It is doubtless true that some provisions of substantive law have found their way into this enormous mass of statutory matter, and that some special branches of procedure are covered by the present code which were not included in the original code. Nevertheless a comparison between the two statutes reveals plainly the fact that for many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process by which, under a multitude of varying conditions, suitors may get their rights.

Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency inevitably leads to continual discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. Whatever we do to our code, so long as the present theory of legislation is followed, the code will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong; the theory is wrong; and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone.

We may well aid this simplification of procedure by applying the same principle of simplicity to certain changes in the

substantive law with a view to making the practical application of the law simple; and, most important of all, we should observe that principle in determining the standards of conduct at the bar.

The condition in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are overworked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, the dishonest man who seeks to evade his just obligations, is encouraged to litigate for the purpose of postponing them. Such a condition is not sporadic and occasional. It is continually recurrent. It is the result of a natural tendency which appears whenever the conduct of affairs in any branch of the social life of man is entrusted to a particular class of men specially qualified for that special work by learning and skill beyond the great body of their fellows. The conduct of such affairs by such a class becomes an art. The art becomes a mystery. Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas, and belief in their importance supersedes the object which they were originally meant to subserve. Special training develops intellectual acuteness and fine and subtle distinctions. The sense of proportion is lost and the broad, simple, direct methods which alone are really useful in helping plain people to attain the substantial objects of practical life become entangled in a network of form and technical refinement.

This tendency shows itself in some degree in every learned profession. It often affects the organization and control of political methods. It often affects the conduct and administrative regulation of government. History is full of illustrations of its working in religion. The development of the fine arts presents a record of a multitude of revolts against the results of its influence. It affects the development of sub-

stantive law. Most of all it characterizes the growth of legal procedure. There more frequently than anywhere else the system takes the place of the object for which the system was created. We need not go back for illustration to the Medes and Persians, or to the priesthood of Egypt, or ask why Cato wondered that the Roman augur could keep from laughing when he looked a Roman augur in the face; for the development of our own system of common law and equity is familiar to us all.

We are now in about the same condition as respects a great mass of technical and specific rules obstructing the course of justice as we were in 1848, when the old law and equity practice of the state was swept away by the adoption of the Field Code — that great enactment which gave form to the procedure of practically every American state following the course of the common law, and which ultimately impressed itself upon the slow-moving but considerate judgment of the English people. We are now in about the same condition in this respect as was England in 1873, when the British Parliament passed the new Judicature Act and yielded to the principle of simplicity in litigation, the allegiance which she has ever since maintained and strengthened. Curiously enough, at about the same time when England adhered to the principles of the reformed procedure we were taking the first great step towards the abandonment of those principles by making the basis of our further development in procedure the revision of the code by my old friend, Mr. Montgomery Throop. There is but one way to deal successfully with the condition resulting from such a process, and that is not by palliatives in procedure but by revolution in procedure. The New York enactment of 1848 was revolution. The British enactment of 1873 was revolution. And it is revolution that we need now.

Let me recall some of the effects of such a system as we now have, well known as they are to all of us. The system of

attempting to cover every minute detail with legislation appropriate to every conceivable set of circumstances is to create a great number of statutory rights which the courts are bound to respect because they are the law; which suitors are entitled to demand because the law gives them. In some cases they may contribute to the attainment of justice. In other cases they may obstruct it. The courts cannot apply the rule of justice because they must apply the law. These artificial statutory rights become the subject-matter of special litigation intervening between the demand for redress and the attainment of it.

The energies of attorneys and counsel and clients, their time and labor, are devoted to these statutory proceedings instead of being addressed to the trial of the case. Pending the disposition of the multitude of motions which it is possible to make, and which in number are often in inverse proportion to the merits of the case, the final disposition of the case is postponed. Serious and long-continued delay is the result in many cases. Witnesses die or leave the jurisdiction. Their memories become vague and the establishment of facts becomes more difficult. Suitors become tired and discouraged, or their means are exhausted. Conditions change, and the relief, when attained, is often deprived of much of its value.

The facilities for delay afforded by this system lead to innumerable defenses for the purpose of delay. These encumber the calendars and occupy the time of the courts, and prevent the hearing and decision of honest controversies. The system tends to breed a class of code lawyers, acute and subtle practitioners, skillful in baffling the efforts of honest men seeking to get their rights and with no conception whatever of the principles of jurisprudence or of the high duty of the advocate to secure substantial justice for his clients. At their hands justice is easily tangled in a net of form. The public estimate of the profession of the law is lowered.

Public confidence in the administration of justice is weakened. The general effect of this great mass of statutory provisions as a whole is not to facilitate, but to impede and hamper the courts in rendering prompt and efficient justice.

All this is wholly unnecessary. Our courts desire to do justice; they are competent to do it; and they will do it if left to themselves under the guidance of a few simple fundamental rules and unhampered by a multitude of statutory requirements. They are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required.

I have always thought that Mr. Justice Stephen J. Field's printed but unpublished little book called "Early Days in California" was most instructive to a student of the law. In the early period of the great gold excitement of 1849, some fifteen thousand men, mostly miners, found themselves collected in the mining camp of Marysville. In that hitherto almost unpeopled region there was no government and no administration, there were no officers of the law, and there were no laws of which any one there knew anything. The need of government was apparent and the miners got together and elected Stephen J. Field alcalde of Marysville. Under that title he proceeded to hold court. There was no procedure. There were no laws to describe or define his powers. There were no statutes or precedents establishing the rights of the parties who came before him; but he heard complaints; and with the whole force of the general concurrence of that rude community, he required the persons complained of to answer. He tried and determined the issues. He enforced the judgments. He tried and punished offenders against those rules of right conduct which obtain generally

in civilized communities, and he rendered justice to the satisfaction of Marysville and the peace and order of the community. It may be useful sometimes and it is refreshing always, to look out from the refinements and subtleties of our sophisticated system for administering the law upon some simple and direct and swift enforcement of the fundamental principles of justice, and to question whether in all our elaborate contrivance of means to attain this end we may not be obscuring and forgetting the end itself.

The real strength of the tendency to make provisions for arbitration of disputes in the rules of business organizations, rests upon a feeling that, if the members of the particular trade or branch of business can get away from lawyers and the law's delays and the cumbrous technical and expensive procedure of our courts, they can have the merits of their disputes determined swiftly, certainly, inexpensively, and adequately. I am inclined to think they are generally right.

Consider the recent development of law administration in the Public Service Commissions, and the Interstate Commerce Commission of the United States. They have not yet embarrassed themselves by any code of procedure. They have not had time. Yet they are hearing and determining in a most adequate and satisfactory way questions of fact and law of the most complicated nature and of vast importance.

It would be difficult to conceive of litigation more important or more complicated than the great controversies between nations which the civilized world is more and more tending to submit to the judgment of arbitral tribunals. Yet the Permanent Court of Arbitration at The Hague has practically no rules of procedure. It cannot have them because the forty-four nations who are signatories to the Hague Convention for the Pacific Settlement of International Disputes differ so widely in their ideas of procedure that the adoption of any single system would be impossible. Accordingly that

great convention, which first gave practical form to the hopes and aspirations that the apostles of peace on earth had been voicing for centuries, contained only a few very simple and fundamental provisions regarding the constitution of the court and the way to get a decision from it, leaving the field of procedure, in the main, to be determined by the common sense of the parties and of the court in conformity to the requirements of each case as it arises.

I remember hearing Mr. David Dudley Field, during the argument of a cause many years ago, ask Charles O'Connor a question as to his position concerning the effect of the pleadings in the case. Mr. O'Connor turned, and, with that intensity which characterized him (especially when dealing with some one whom he did not like) he answered: "I understand that under your code, Mr. Field, the plaintiff comes into court and tells his story like one old woman and the defendant comes in and tells his story like another old woman." And that was all the satisfaction Mr. Field got. The reply was intended as a condemnation of the rather simple code of that day, but I am not sure that it was a condemnation. The old-woman method doubtless has its disadvantages, but I am not so sure that they are not to be preferred to the subtleties of the special pleader and the code lawyer. If we could substitute for Mr. O'Connor's old woman a man of common sense with a reasonable knowledge of substantive law and a trained sense of materiality and relevancy, we should have come very near the chief end and object of all legal procedure. I think it is safe to say that if we must choose between two much procedure and too little we better have too little.

I wish to guard here against the misapplication of what I have said lest it have the effect of over-statement. It should not be inferred from what I have said about our procedure that in general, considering by itself each case which does

come to a final judgment, the ends of justice are not attained. As a rule, in most cases which reach that point justice is done because we have honest and competent judges and an upright, independent, fearless, and loyal bar. Yet it is done in a great proportion of cases, not by the aid of, but in spite of, this vast multitude of statutory restrictions, and with an enormous waste of time and labor and expense and delay. I do not mean to be understood as asserting that a great part of the provisions contained in our code do not point out quite reasonable and proper methods of procedure to be followed in some cases to which they seem to be applicable, and probably in the cases which the legislature has had in mind in enacting them into law. Yet in a great number of other cases they are burdensome and obstructive; and it is true in general that the more detailed provisions of law are, the more certain they are to be misfits in many cases to which they come to be applied. I do not mean to say or to imply that the members of the bar are subject to just criticism for insisting in each case entrusted to them that their clients shall have the benefit of all the statutory rights which the legislature has provided. Suitors are entitled to the rights the law gives them. They are entitled to have their counsel assert those rights and to have courts award them. I do insist, however, that the law ought to be such that what a suitor is bound to do or to suffer by way of means or preliminaries leading to a final decision on the merits of his case, should be determined, as far as possible, by the common-sense requirements of that particular case, and as little as possible by compliance or failure to comply with detailed and technical statutory requirements designed to cover ten thousand different cases as well as his. I do insist that, notwithstanding the many just decisions rendered by our courts, when we consider the prevalent delay, the unnecessary expenditure of time and effort and money, the hindrance of just rights

through long-continued defensive litigation without substantial merit, the litigants who abandon their pursuit of justice through weariness or lack of means, the citizens who abandon their rights rather than incur the annoying and injurious incidents of litigation in the effort to enforce them, the emboldening of the unscrupulous in whose hands delay and difficulty and expense of litigation are weapons with which to force compromise without just grounds — when we consider all these incidents of our present condition we are bound to say that the general interests of the administration of the law require a thorough and radical change.

The situation cannot be met by merely increasing the judicial force. We have often tried that expedient, but always ineffectually. The only real remedy is to be found in reforming the system.

I have said that the most important thing of all toward re-enthroning the principle of simplicity and directness in attaining the ends of justice is that we ourselves shall observe that principle in determining the standards of conduct at the bar. No system will work well unless it is applied in good faith. Even though we may escape in a great measure from the statutory restrictions which now hamper the courts in applying the rule of justice in the particular case to the proceedings in that case, the rule cannot be successfully applied unless the sentiment of the profession — the public opinion of the bar, makes conformity to that rule a requirement of honorable obligation.

What I have in mind may be illustrated by reference to two proposed provisions which have been much favored by our committees and which, it seems to me, should find their place among the simple and fundamental provisions of any system of procedure. One is, the provision that in every case a day shall be given when the parties, through their counsel, may come before a judicial officer informally for a rule regu-

lating the further procedure in the case, covering the whole ground of pleadings, bills of particulars, discovery of documents, deposition of witnesses, mode of trial, etc. — the so-called omnibus summons provision. This would be a most useful substitute for the separate, successive motions under special statutory provisions now permitted, yet I can well see that its effectiveness could be largely destroyed if the bar generally were to attempt to evade it instead of accepting in good faith the opportunities which it would afford.

The other provision is, that no error of ruling upon the admission or rejection of evidence or otherwise in a trial, shall be ground for reversal unless it appears that a different ruling would have led to a different judgment. Real acquiescence in such a rule by the bar would put an end to the incessant objections and exceptions which now disfigure so many of our trials. We share with England and her colonies a highly artificial and technical body of rules of evidence such as obtain nowhere else in the civilized world. These rules afford most delightful exercise for intellectual acumen, and they have some advantages. They have also great disadvantages, and it is by no means certain that in the long run they produce any better results than the simple and natural methods which obtain in the trial of cases in countries that follow the course of the civil law, and where the method of Mr. O'Connor's hypothetical old woman controls in the giving of testimony as well as in the statement of the case. The fundamental disadvantage of this Anglo-American system of rules is the fact that, when strictly and technically applied, they do not correspond with the instincts or the habits or the ideas of common sense of any plain, sensible layman in this world. Their strict application continually impresses clients with a sense of injustice because they think they are not getting their case before the court, and it impresses witnesses with a sense of being bottled up and prevented from telling

the truth. In the strictness and technicality with which we enforce those rules we go far beyond England or, so far as I know, any of her colonies. I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there again and again by objections as to irrelevancy and immateriality and hearsay, when what he is trying to say would not do the slightest harm to any one and would merely help him to state what he knows that is really competent and material. Such a rule as I have now mentioned would take away the faint hope of a technical reversal which underlies such objections; but the legal right to object would continue, and incessant technical objections would probably continue to prolong many trials and impede the speedy ascertainment of the merits of many causes unless the bar in good faith were to accept as a rule of conduct that no objection should be made or point raised not really affecting the merits.

I presume upon your not remembering something that I said at Rochester a year ago, to repeat that we are too apt at the American bar to act as if in litigation we are playing a game, with the judge as referee of the game. Only the bar itself can cure that, and realize the highest usefulness of a noble profession by devoting its learning, its skill, and its best effort to securing for every suitor, as promptly as possible, a fair and final judgment on the merits of his case.

The complication of our procedure is only one phase of a general tendency affecting the whole field of government and law in the rapidly developing, intricate, and interdependent social conditions of our time. In the fundamental act at the polls, when the sovereign people select those who shall make the laws and shall administer them, the voter has placed in his hands a ballot of enormous size, sometimes too large to be

spread out fully in the voter's booth, and with such a vast array of names for such a great number of offices to be filled, and with so many questions to be decided in the affirmative or negative, that the best trained and best informed mind must fail to do its whole duty intelligently. The need for simplification here is recognized by the advocates of the short ballot, who have my most sincere good wishes.

The mass of our statutes has grown so great that the volumes constitute a library in themselves and require another library of indexes and digests and guides to ascertain what the law is. We are continually trying to simplify this condition by consolidations and revisions and codifications, all of which are useful.

The mass of judicial reports has grown so great that it begins to seem as if before long we shall have to burn our books like the Romans and begin anew. And indeed, where decisions can be found in support of every side of every proposition, authority is in a great measure destroyed and we do begin anew in determining by the light of reason which authority shall be followed. I wish that our judges could realize officially what so many of them agree to personally — that restating settled law in new forms, however well it is done, complicates rather than simplifies the administration of the law; that the briefest of opinions usually answers the purpose of the particular case; and that the general interests of jurisprudence justify reasoned opinions only when some question of law is determined which has not been determined before by equal authority.

On every side the increasing complication of life calls for vigorous and determined effort to make the working of our governmental system more simple. Our primary concern as lawyers associated to consider the public aspects of our professional work and to promote the usefulness of the profession to the community, is with our own procedure.

JUDICIAL DECISIONS AND PUBLIC FEELING

PRESIDENTIAL ADDRESS AT THE ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION IN NEW YORK CITY, JANUARY 19, 1912

THERE appears to be an increasing tendency among Americans towards impatience with the courts whenever judicial decisions do not agree with our wishes.

The provisions for the recall of judges already adopted in some states and widely advocated in others are an exhibition of this impatience and a demand for more unchecked opportunity to make the judges feel its effect.

A distinguished judge is reported to be considered for promotion to the Supreme Bench. Thereupon there arises, not a discussion regarding his ability or integrity or experience, but an outcry that he ought not to be promoted because he decided a two-cent fare case against the wishes of some people or many people.

The Court of Commerce decides that the Interstate Commerce Commission has taken too broad a view of its powers under the law in a particular case and the immediate reaction is, not an acceptance of the decision and a proposal to change the law so as to make the powers broader, or an appeal from the decision in order to show by argument that it is wrong, but the drafting and introduction of a lot of bills to abolish the court.

A court of great authority decides that a particular form of employers' liability law contravenes the rules established by the Constitution and the immediate reaction is, not to procure the enactment of a statute which does not contravene those rules, or to procure a modification of the rules so that they

will permit the statute, but it is to condemn the court for not entertaining a different opinion.

There are many indications that, in varying degrees, in different parts of the United States this method of treating the decisions of courts receives popular sympathy. A gradual decrease of respect for judicial decisions can be perceived.

The general respect for the decisions of our courts, which has sustained the judicial branch of our Government as a distinctive and necessary part of our constitutional system, has been based upon the idea that judicial decisions are something quite distinct and different from the expression of political opinions or the advocacy of economic or social theories. Profoundly devoted to the reign of law, with its prescribed universal rules as distinguished from the reign of men with their changing opinions, desires and impulses, our people have always ascribed a certain sanctity to the judicial office, have invested its holders with a special dignity, and have regarded them in the exercise of their office with a respect amounting almost to reverence, as above all conflicts of party, and of faction, because these officers are the guardians of the law as it is. Our people have been imbued with a deep sense of the truth that upon the preservation of the law as it is at every moment in its course of continuous change and development, depend the preservation of order, the prevention of anarchy, the protection of the weak against the aggression of the strong, the perpetuity of free institutions, the continuance of liberty and justice; matters of infinitely greater concern than all the new proposals which excite the activity and controversy of parties and political leaders, of critics and reformers.

If this view is to be changed and the decisions of our courts are to be considered in the same way and upon the same presumptions and with no greater respect for authority than in the case of political opinions, the authority of the courts will

inevitably decline, the independence of the judicial branch will cease, judicial decision will interpret the law always to suit the majority of the moment, and the recall will be the natural and logical expression of the relation to be assumed between the people and the courts.

What are the causes of this impatience with the courts? It is plain that the difficulty does not arise from any deterioration in the character of the judges who preside in our courts. There never has been a time when the bench in America, both under the federal and state systems, has been filled by men of greater purity, ability, and strength and uprightness of character. There never has been a time when the favor of the rich or of men powerful in social or business affairs played so small a part in determining the selection of judges. Now, if ever, the terms of the federal judicial oath truly represent the controlling influence of judicial life in both the nation and the states.

I, ——, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as —— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God.[1]

It is true that defects in procedure, that technicalities and delays which impede the course of justice here and elsewhere have tended to decrease the general respect of the community for every one concerned in the administration of the law, but I think this applies less to the courts themselves than it does to the bar, and justly so. It is the bar that makes up a great part of all our legislatures and is responsible for the stupid and mischievous legislation regarding procedure which hampers the courts in their efforts to do justice. It is the bar which, knowing all the facts and familiar with all the evils, insists upon the continuance of our

[1] Section 251 of the *Judicial Code of the United States*, March 3, 1911.

methods to promote the immunity of criminals and the hindrance of justice to the point of denial. The primary fault and the primary duty of reform rest with us. I do not think that this matter plays any very great part in the creation of the feeling against the courts.

The real difficulty appears to be that the new conditions incident to the extraordinary industrial development of the last half-century are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when existing laws were passed or existing limitations upon the powers of government were prescribed in our Constitution. In place of the old individual independence of life in which every intelligent and healthy citizen was competent to take care of himself and his family we have come to a high degree of interdependence in which the greater part of our people have to rely for all the necessities of life upon the systematized coöperation of a vast number of other men working through complicated industrial and commercial machinery. Instead of the completeness of individual effort working out its own results in obtaining food and clothing and shelter we have specialization and division of labor which leaves each individual unable to apply his industry and intelligence except in coöperation with a great number of others whose activity conjoined to his is necessary to produce any useful result. Instead of the give and take of free individual contract, the tremendous power of organization has combined great aggregations of capital in enormous industrial establishments working through vast agencies of commerce and employing great masses of men in movements of production and transportation and trade, so great in the mass that each individual concerned in them is quite helpless by himself. The relations between the employer and the employed, between the owners of aggregated capital and the units of

organized labor, between the small producer, the small trader, the consumer, and the great transporting and manufacturing and distributing agencies, all present new questions for the solution of which the old reliance upon the free action of individual wills appears quite inadequate. And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose.

Such a readjustment must of necessity be a gradual process. It cannot be produced at a single blow from the mind of any one or of any group or interest or class. Opinions must and will always differ as to the nature of changes which should be made and the extent to which they should go, and those differences must be settled in some way. There will be differences not merely as to what change should be brought about, but how it should be accomplished. Mistakes will be made, experiments will be tried and will fail, and experience will suggest more adequate remedies. Ill-conceived schemes of legislation or amendment will be attempted and steps will have to be retraced. Erroneous views, arising because some parts of our people fail to understand phases of our vast and complicated industrial life with which they are not familiar, must be corrected. Distorted and exaggerated conceptions disseminated by men of one idea or by men over-insistent on their own personal interests, or over-excited by contemplating unhappiness and privation which perhaps no law or administration could prevent, have to be reduced to proper proportions. Ultimately, step by step through the ordinary processes of self-government, through investigation, education, the spread of true understanding of facts and full discussion, the process of readjustment is being worked out and will be worked out to conform to the mature, instructed, considerate judgment of the self-governing people of the country.

It is because in the course of this process of readjustment occasionally a court finds that some new experiment in legislation or in administration contravenes some long established limitation upon legislative or executive power, or finds that some crudely drawn statute is inadequate to produce the effect that was expected of it, or enforces some law which has unexpected results, that the present irritation and impatience towards the courts have been created.

There are several things to be said about this feeling. In the first place it rests upon a misconception as to the true function of a court. It is not the duty of our courts to be leaders in reform or to espouse or to enforce economic or social theories, or, except within very narrow limits, to readjust laws to new social conditions. Undoubtedly every judge is bound to consider two separate elements in his decision of a case: One, the terms of the law, and the other, the conditions of actual life to which the law is to be applied, and it is only by considering both, that the law can be applied in accordance with its real spirit and intent. But the judge is still always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve or change the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy. It is very important to have reformers and advocates of all good causes and thoughtful and public-spirited citizens who are keenly alive to the defects in our system of laws and solicitous to find means to cure them. But the courts are excluded, by virtue of the special duty imposed upon them, from playing any of these parts. Their duty is to maintain and enforce the law as it is at the moment, to interpret it in sincerity and truth under the sanction of their oaths and in the spirit of justice, to accept loyally every change made in it by the law-making power, but to stand firmly against any attempt to

ignore it or nullify it, except by the legitimate action of the popular sovereign in its making of constitutions, or the legislative branch of the government in its making of statutes in conformity to the constitution.

This impatience with the courts also proceeds upon a second misconception as to the true nature of the remedy for an unsatisfactory decision. When a court of last resort has said the law is thus and so, and the law as so declared bars the way of some popular movement, the true remedy is, not to threaten the court with extinction or its members with punishment unless they will decide against their convictions; but it is to set the lawmaking body in operation to change the law, and if a majority of the people wish the law changed it will be done. If the community is not satisfied with a law as it is declared by the court to be, the thing really desirable is, not to coerce or reconstruct a court to say that the law is what it is not, but to make the law what the community wishes it to be. The only real obstacle to any such course rests in the fact that it frequently happens that the people of a state or of the country are not yet ready for the change which is desired by the impatient ones. These may be merely in advance of the rest of the people. It may be, and doubtless it frequently is the case, that their views are the views which ought to be adopted and which will ultimately be adopted by the people in their lawmaking, but the process of securing the adoption of new and advanced ideas may be long and tedious. It may involve a campaign of education, a reconciliation of conflicting views, and much discussion as to the kind and form of change. Important changes in the law ought to be fully discussed and understood and approved by the mature judgment of the people of the country. We have too many immature and premature attempts at making laws before the subjects to which they relate have been thoroughly discussed and mature conclusions have been reached.

I must believe also that proposals, in whatever form, to subordinate the decisions of the courts to the decision of a popular majority, whether it be by punishing the judges for an unsatisfactory decision through removing them from office, or by reviewing their decisions at the polls as distinct from reviewing and revising the law upon which they are to decide, proceed upon a failure to realize that this involves an abandonment of the most essential feature of our system of constitutional government.

We may grant that inconvenience frequently arises from decisions of courts finding that constitutional provisions are contravened by legislative action designed to express the popular will in particular cases. We may assume that some of these decisions are erroneous. It is impossible that there should not be some errors among fallible men under any system of government and any distribution of powers, although there are probably by no means as many errors as the ardent advocates of particular views suppose. But under every system and in every field of governmental action it is necessary to submit to inconveniences. Honest and peaceful men are constantly subject to restriction and annoyance from rules and regulations which are wholly unnecessary so far as they are concerned, but which have to be established and maintained in order that dishonest and turbulent men may be controlled. All general rules of law work hardship in some cases. These incidental effects are a part of the price which in organized society we pay for having general rules of law and administration. We are frequently very much irritated and very impatient under the inconvenience or injury, which in viewing some particular incident by itself seems unjustifiable. The true question, however, always is, whether, viewing the working of the general rule as a whole, the rule is so necessary to the well-being of the community, and its effects, taken altogether, are so valuable, that we ought to submit

to the inconveniences rather than to lose the rule. In considering the inconveniences which have arisen from decisions of the courts enforcing constitutional provisions as against popular statutes, it is a mistake to consider the particular incident by itself and to lose sight of the enormous and overwhelming importance of the system to which these inconveniences are incidents, and to forget that by destroying the independence and authority of the courts and the popular habit of submission to their decisions we would lose infinitely more than we would gain. Let me try to state the essential thing that we would lose.

One of the fundamental ideas of our government is that all the officers to whom the people, whether of the nation or of the state, entrust the powers of government shall be subject to certain definite prescribed limitations upon their power. These limitations are of two kinds. First, those which relate to the distribution of powers. The national government and the respective state governments are each to keep within its own prescribed field of action. The legislative, executive, and judicial officers are to be confined to their own departments of government. Within those departments particular officers, wherever it is found expedient, have specific lines of limitation upon their power. If an officer undertakes to do something which is not within the prescribed limits of his authority his action is void and without legal effect. No matter how able and patriotic a president or a governor may be, no matter how wise a congress or a legislature may be, no matter how much they may deem it to be for the public good that they should invade the field of action of another department, they are denied the right to do it, not because it might not be a very good thing in the particular case, but because the prevention of unlimited power is of such vast importance to liberty that no particular case can possibly be important enough to justify abandoning the

maintenance and the observance of the general rule of prescribed limitations. The door opened for the well-meaning and far-seeing lover of country to exercise power without regard to the limitations set upon it is also a door opened for the self-seeking and ambitious to disregard the same limitations for their own advantage. It is impossible to maintain a rule of limitation upon power which is to be observed when it seems wise and ignored when it seems unwise. The other kind of prescribed limitation is for the protection of the individual citizen against the power of government. Our fathers had experienced some and observed many invasions of individual liberty and individual right of which governments had been guilty. They realized that the nature of men is not greatly changed by a change in the form of government and that the possession of overwhelming power affords a constant temptation to override the rights of the weak. Accordingly, both in the nation and in the state, they prescribed certain general rules which prohibited all officers to whom they entrusted the powers of government from doing certain things, such as inflicting cruel and unusual punishments, abridging freedom of speech or of the press, prohibiting the free exercise of religion, putting any person twice in jeopardy for the same offense, compelling any one to be a witness against himself in a criminal case, taking private property for public use without just compensation, depriving any one of life, liberty or property without due process of law. It frequently happens that inconvenience results from the application of these rules. Criminals escape because they cannot be tried twice or cannot be compelled to testify; public improvements are hindered because property cannot be taken except by due process of law; the liberty of the press and of speech often degenerates into license and many poor people are misled to their harm by the doctrine of strange and irrational religious sects. Nevertheless the maintenance of these

rules is the bulwark which protects the weak individual citizens in the possession of those rights which constitute liberty; and it is because these rules with all their inconveniences, if maintained at all must be always maintained, that the public officer who oversteps them, with however good intentions and for whatever benefit to the public, becomes a trespasser without authority and without protection of the law.

A second and equally necessary feature of our system is that these limitations, both those which distribute official powers and those which declare the great rules of right conduct must be prescribed abstractly and impersonally rather than with reference to particular cases or particular exigencies or particular individuals. The difference is generic, essential, world-wide. The very fact of making a constitution which is to be binding upon legislatures and executives and judges when they come to deal with particular cases exhibits the rules prescribed in the Constitution in sharp distinction from the determination of official power when particular cases arise. It is not possible for any human power to make the determination of a legislature or executive at the time of action the same thing as an obligatory general rule of conduct prescribed beforehand. The difference between a constitutional convention prescribing constitutional limitations and a legislature dealing with particular exigencies is not that one represents the people any more truly than the other, or is of any higher character than the other, but it is that one deals with justice, with right conduct, with the requirements of liberty, with a due balance and distribution of the powers of government impersonally and in the abstract without reference to individuals or the interests or prejudices or inconveniences of particular cases; while the other deals with the particular cases to which the general impersonal rule applies. So it is that at almost every session of our legislative bodies we find attempts made to evade or to appear to evade

constitutional rules in order to accomplish specific purposes, when beyond a doubt the very body which attempts the evasion would refuse to abandon the rule as a guide to conduct except in the particular case under consideration. Indeed if it were not for the fact that legislatures and executives would fail to apply the impartial and universal rules of our constitutions to the particular case with which they deal if left free at the time there would be no occasion for constitutions. The provisions for amending constitutions are so framed in general as to provide for dealing with all of the subjects with which they treat in the abstract as distinct from dealing with instances that arise under them legislatively in the concrete. So we deal with abstract rules by themselves and we deal separately with the particular cases in which governmental action is to be governed by those rules. We know that human nature is such that the two cannot be combined; that a decision upon a rule of abstract justice cannot be combined with a decision as to the accomplishment of a particular wish any more than a man can render justice when he sits as a judge in his own cause.

A third feature of our system which is a necessary corollary to the other two and essential to them, is the vesting of power in the judicial branch to determine when the action of the legislative and executive branches or any officer of them oversteps the limitations which have been prescribed. Without this all our bills of rights and limitations upon official power would be idle forms of words. If the lawmaking body of the moment, whether it be a representative legislature or a majority at the polls, is to determine at the time of action either what shall be the rules to control its conduct or the question whether its conduct conforms to the rules already prescribed, that conduct is controlled only by the will of the lawmaking body at the moment of action, and our whole system of prescribed limitations upon power disappears. The necessary

result is that the barriers we have set up from the beginning of the government against official usurpation of power and against official invasion of the liberty and rights of the individual, are broken down, and the power of the majority according to the will of the moment is supreme and uncontrolled.

Chief Justice Marshall says, in the leading case of Marbury *v.* Madison:[1]

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives, there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.[2]

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We cannot maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign

[1] 1 Cranch, pp. 137, 176–177.

[2] For a previous reference to this opinion of Chief Justice Marshall and a longer quotation, see page 108 f.

people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta — the truth that human nature needs to distrust its own impulses and passions and to establish for its own control the restraining and guiding influence of declared principles of action.

Upon the choice between these two systems of government, whether it be between the independent power of the judiciary and the unrestrained will of a representative legislature, or between the independent power of the judiciary and the unrestrained will of a popular majority, we may not ignore the warning of Hamilton, in *The Federalist.*

"For I agree," he says, quoting Montesquieu, "that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'[1] . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[2]

[1] Montesquieu's *Spirit of the Laws*, vol. i, p. 186.
[2] *The Federalist*, No. 78.

If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but we shall be exhibiting the weakness which thoughtful friends of free government the world over have always feared the most — the lack of that self-control which enables great bodies of men to abide the slow processes of orderly government rather than to break down the barriers of order when they obstruct the impulse of the moment.

What is the remedy for this condition? How can the process be arrested?

I think the courts can do something. They may sometimes perhaps keep more fully in mind what Chief Justice Marshall said in the case of Fletcher *v.* Peck:[1]

> The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Sometimes perhaps they may take a little more pains, when they have to decide against the constitutionality of a law, to make the grounds of their decision intelligible not merely to technical lawyers, but to laymen. Although the decision in a case technically affects only the parties, when the case becomes the occasion for a decision affecting great numbers of people, it is as much a judicial duty to see that

[1] 6 Cranch, 87, 128.

the people do not misunderstand the ground and scope of the decision as it is to see that the parties and their counsel are informed.

It may be also that some judges who have been long withdrawn by their duties from active participation in current affairs could profitably study with more interest those changes of social conditions which make necessary new applications of the police power of the state — that vast and adaptable power preserved in all constitutions, the basis of which rests in common sense and the relations of which to the specific guarantee of the constitution must always be subject to adjustment according to the varying needs of the time. The Supreme Court says of this power in the case of Barbier *v.* Connolly:[1]

> The Fourteenth Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

The bar can do much. A lawyer has special opportunity to acquire a just sense of the importance of preserving the

[1] 113, U. S. 27, 31.

constitutional system of our country and of maintaining the undiminished power of a really independent judiciary. He can explain this and insist upon it among his clients and his fellow-citizens in private and in public and can secure for it from citizens in general that attention and thoughtful consideration which alone is necessary to secure just results among an intelligent people.

One other thing we can all do, and that is, to encourage and exhibit the true spirit of temperate and patriotic consideration which is the primary requisite to success in working out the problems of self-government. Some of the recent discussions of judicial conduct have been dignified and temperate expressions of reasoned opinion which we must respect, although we may not agree with it, such, for instance, as the recent article by Mr. Roosevelt in *The Outlook*.[1] Some other expressions, however, have been rather exhibitions of violent temper and appeals to prejudice, imputations of sinister motive, and incitements to hatred. Such expressions we may not hesitate to condemn, and I am glad to believe that the condemnation will find a response among the great body of American people. It is not so that free government makes true progress. Along that pathway lies intolerance and hatred, strife and civil war, and revolution, the survival of the strong and the oppression of the weak. There is no reason to believe that those who seek to accomplish their will concerning the political and social questions of our day are any more sincere in their convictions than have been those who in other times and in other lands have stained the earth with the blood of countless thousands in the conflict between religions and sects, and races and classes of men, or that they are any more sincere than those who in times now happily passing away have, by appeal to arms, kept the constitutional

[1] "Arizona and the Recall of the Judiciary", by Theodore Roosevelt, *The Outlook*, June 24, 1911.

republics of Central and South America in a state of almost perpetual revolution. The appeal to prejudice and passion and hatred finds its natural sequence in appeals to force and in destruction of order. True love of country is not mere blind partisanship. It is regard for the people of one's country and all of them; it is a feeling of fellowship and brotherhood for all of them; it is a desire for the prosperity and happiness of all of them; it is kindly and considerate judgment towards all of them. The first duty of popular self-government is individual self-control. The essential condition of true progress is that it shall be based upon grounds of reason, and not of prejudice. Lincoln's noble sentiment of charity for all and malice towards none was not a specific for the Civil War, but is a living principle of action. These are truisms, but if at any time they should be forgotten (and they seem to be sometimes), we should remember that they are also essentials; and we should recall them and insist upon them and preach them, for they are part of the gospel of human freedom.

THE INDEPENDENT BAR

ADDRESS AT THE DINNER OF THE NEW YORK STATE BAR ASSOCIATION, NEW YORK, JANUARY 20, 1912

IN behalf of that great organization which we love to call the bar of our imperial state, represented by the Association of the bar of the state, I welcome the President of the United States. I welcome the Ambassador who represents our ancient ally, the sister republic of France. I welcome the distinguished Justice of the Court of the King's Bench of the nation which lies along our northern border. I welcome the distinguished representative of the bar of Canada. I welcome the Secretary of War of the United States. I welcome the Federal and State Judges. All of whom have come to honor us by their presence and to testify by their presence to their consciousness that there lives in the bar, in its independence, its dignity and its faithful performance of its high duty, an influence for liberty, and justice and for civilization that is worthy of their homage and their respect.

My friends of the bar, we have many shortcomings and no one knows them better than we. We do sometimes in the ardor of our advocacy for our clients tangle justice in the net of form; but that is the defect of a virtue, and the virtue is that noblest and most indispensable of virtues, the virtue of loyalty; loyalty to the cause we represent, to the client who entrusts his interests to our charge.

I think that we are upon the threshold of a period in which deeper and more fundamental questions must be considered by the profession of the law than we have ever been accustomed to. Many of the principles which we have thought to be postulates, or axioms, are questioned. We must re-orient ourselves and by thoughtful consideration, by attesting the

purity of motive and the unselfishness of patriotism qualify ourselves, not merely for contention as to individual rights under established laws, but for the defense and maintenance of the fundamental principles of those laws themselves.

There is one thing which above all others has seemed to me to make the advocate of essential value to the preservation of liberty and the maintenance of justice, and that is that he fears not the face of power. With all our shortcomings, with all the wide variation of character, and the many differing degrees of ability and force which are to be found in an association of lawyers like this, there is one thing which among all the lawyers of America we are sure to find, and that is, that for the weakest, for the poorest, for the most unnoted and uncared-for client, we fear not, not one of us, not the weakest of us, to assert rights against all overwhelming power whatever. So long as there exists in a civil community a great body of men who have that characteristic, liberty cannot die.

There is a reason for it, and the reason is that not alone with us, but through us the community in which we live, throughout all the people who ordain the laws that we seek to enforce, whose protection we invoke, whose mandates we assert, — throughout all the people there exists a deep, and I think an ineradicable sense of the supremacy of justice — justice dependent upon no whim or fancy of a ruler, justice dependent upon no impulse or passion of a majority, justice which is a covenant between all government and the humblest citizen who is governed. And when we speak in the name of justice as against whatever overwhelming tide of public opinion of the moment, we are invoking a power that lies beneath, that outlasts, that is superior in its control and more sacred in the allegiance that it commands, than any political, or social, or personal desire among our people.

In our government, among every free self-governing people, the declarations of the principles of justice, the rules

of right conduct declared, whether in written constitutions or in customs or judicial decisions, are a guarantee from the majority to the minority, a guarantee of the mighty power of all the people, but one to that one. We have believed, we have always believed, our fathers believed, our government is founded upon the belief, that for the weakest and the humblest, be he a criminal condemned to death, be he without friends, money or power, or influence, whoever speaks in the name of that justice which is superior to human desires and impulses and wishes, has behind him the power of the deliberate and mature judgment of the people in their sober moments, when the voice of the people is the voice of God.

We are told that the great principles of justice which we have declared without regard to persons or to interests or to time, are now to be subordinate to the will of a majority; and if that be so, the independence and the dignity of the bar are gone. If that be so, the liberty of our people will soon be gone. For it is as true now as it was when at the hearthstone of our homes we learned it, that men in the moment of their impulse, of their desires, of their passions, are weak and prone to err; and the guidance of principles alone can keep men in the straight and narrow path of justice.

My friends, you all have cases in which you are interested, clients for whom you are anxious to do your best, but you have here now the greatest cause that any American lawyer ever entered upon; and all the clients you ever had or ever will have, and all the interests for which you ever argued are involved in your maintaining, through the learning, the experience, the special opportunity and necessity for thoughtful consideration that pertain to the bar, the great cause before the American people of a justice that is above majorities and rests on the basis, not of any popular vote, but of the eternal laws of God.

It is because I feel deeply the necessities of the situation that now confronts the bar, that this meeting of the New York State Bar Association seems to me to have a special significance, and it is because I believe you will do your duty as guardians of the law, as advocates not of clients but of the law, that I hail you all as members and congratulate you upon the great success of this thirty-fifth annual meeting. It is because you are the advocates of this great and fundamental principle that it is worth the while for these gentlemen to come from the posts of their great offices to meet with you tonight.

REFORMS IN JUDICIAL PROCEDURE

ADDRESS BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES, FEBRUARY 27, 1914

The Judiciary Committee of the House of Representatives, Sixty-third Congress, Second Session, Honorable Henry D. Clayton of Alabama, chairman, met on February 27, 1914, pursuant to a request of the American Bar Association, for a hearing on certain bills, particularly H. R. 133, "To authorize the Supreme Court to prescribe forms and rules and generally to regulate pleading, procedure, and practice on the common-law side of the Federal Courts"; and H. R. 4545, "To amend an act entitled 'An act to codify, revise, and amend the laws relating to the judiciary', approved March third, 1911." The second of these bills, more fortunate than the first, passed Congress and was approved December 25, 1914. See foot-note, page 474.

Among the members of the American Bar Association in advocacy of the passage of these bills, were Honorable William H. Taft, the president of the association, Honorable Alton B. Parker, of New York, and Senator Elihu Root. Mr. Root addressed the Committee as follows:

I AM very glad to join my brethren of the American Bar Association in saying a word on this subject, although I had not expected to take it up at this stage.

There are three bills on the same subject-matter as the bill which you have been discussing now before the Senate Committee on the Judiciary. They have been referred to a subcommittee, which is about to take them up and probably give hearings upon them. Those bills are one granting to the courts the power to make rules on the common-law side, one permitting a case brought on the wrong side to be transferred over to the other without going back and beginning over again, and one preventing the reversal of decisions except for matters going to the merits.

Let me say, as I am here, something about the practical aspect of this kind of legislation. Bills intended to cure the evils spoken of have been before both Houses of Congress for a great many years and there has been a very gradual

advance in sentiment regarding them. At first, I can recall the American Bar Association Committee coming before the Senate Judiciary Committee and being unable to get any bills of the character reported. Then, after a few years, the committee came to report them. I think I have reported bills on all of these subjects from the Senate Judiciary Committee to the Senate several times and I think the same course has been followed in the House. Then these bills came to the stage of passing one House and dying in the other. Judge Clayton has just mentioned a bill which was passed in the House and passed with amendments in the Senate, but which failed to become law because of the conditions late in the session. There have been a number of bills aimed at these evils that have gone through one House or the other. It is quite evident that there is a general feeling that there are defects in our system of practice which stand in the way of the doing of justice and which ought to be cured. What we need is to have united action and bring the subject up out of the level of private bills onto the level of matters of public importance that require the united action of the committees in both Houses — the united and coöperative action of the committees of both Houses.

I am not going into the details of these bills. They differ slightly in form before this committee and before the Senate committee, but that can be regulated by conference either before or after they have passed; but I want to say that all point out the same evil throughout this country in greater or less degree.

We have come to the building up of systems of practice in which justice is tangled in the net of form, in which a plain, honest man coming into court to assert his rights or to ask redress for a wrong finds himself confronted by statute-made obstacles to getting a decision on his demand. My own state of New York is the worst sinner in that respect in the

country, I believe, although it was very nearly seventy years ago that Mr. David Dudley Field started the reform procedure which spread over the greater part of the country and which was followed by Great Britain in 1873. But just about the time that the country at large had adopted the reformed and simplified procedure and Great Britain, from which we derive our system of law, had followed, we began to take a back track and to build up a complication of procedure until now legislatures have put into practice specific provisions for this thing and that, and that, and that, giving a litigant a right to an examination here, giving him a right to interlocutory relief there; so that a man who comes into court saying he has been wronged and asking a judgment, has to try twenty lawsuits about statutory rights before he can get to a judgment on his simple demand. When we make a statutory right the judges have got to observe it just as much as they have the original right founded on common justice. If they ignore it, there is reversal; and so the man who has but little means to employ lawyers, the man who has but little time to take from earning his livelihood, becomes discouraged and sometimes is ruined; and the men who have abundant means to employ lawyers can secure immunity against being brought to justice upon the demands of poorer and humbler litigants. A race of acute, adroit code lawyers has grown up. You will find men in any of the great states where this system prevails, where the legislature has been interfering with the practice, who will undertake for reasonable compensation to delay any case indefinitely; and as a rule they can do it. The reason is that our legislatures have built up a great system of technical procedure creating statutory rights which prevent the courts from doing justice.

Mr. McCoy. Is it not true that a lawyer who has encountered something in his own practice is likely to go up to the legislature and get an amendment to the code?

Mr. ROOT. Precisely. And the prohibitions which are put in our constitutions against special legislation have contributed to that. Somebody sees what seems to him an evil in his own practice, or he is disgruntled; something has been done that he does not like, and he becomes a member of the legislature, and he gets a change in the code of procedure. That may be all very well for him, but it may be very bad, indeed, for ten thousand other people; and our system of practice has been built up in that way on special instances to answer the demands of the lawyer who thinks about his own case instead of considering the general interests of the public.

Mr. THOMAS. Senator, how long after filing an equity suit in New York can you get a trial?

Mr. ROOT. It does not take very long to get a trial of an equity case there. Two months, Judge Parker says. The great trouble is not so much getting to the trial; it is that we have so many technical provisions that you have to go back and have another trial.

I was about to say that our judges want to do justice. Here and there there may be a judge who does not want to, but it is a very rare exception. My observation is that three times out of four they are prevented by the technical rules of practice from doing the justice they desire to do.

Mr. MCCOY. May I make another suggestion, Senator?

Mr. ROOT. Yes, sir.

Mr. MCCOY. In answer to Mr. Thomas's suggestion, I would say that you can reach a case in New York City on the equity special term in two months, provided all these technicalities have not been used against you.

Mr. ROOT. Yes, sir; after the case gets on the calendar and if there are no proceedings to prevent.

Mr. THOMAS. Senator, please tell us what you think of the constitutionality of this bill.

Mr. Root. You mean the bill authorizing the Supreme Court to make rules ?

Mr. Thomas. Yes, sir; this bill we are discussing now.

Mr. Root. I have never supposed there was any serious question as to its constitutionality. Of course, this would not confer upon the Supreme Court the power to abolish jury trials, and it would not confer upon them the power to violate any provisions of the Constitution; but, really, the effect of this bill is —

Mr. Volstead (interposing). Would it confer upon the judges the right to modify any existing statute ? That is, can we delegate to the courts the power to change an existing statute ?

Mr. Root. No; we cannot. But it is this bill which changes the existing statute. We do not authorize the courts to do so. What we have now is a statute which requires the courts to conform to the practice in the separate states. This bill is a substitute for the requirement of conformity to the practice of the separate states. It modifies that requirement by authorizing the courts to make the rules of practice. To that extent this law will modify the existing statute. We do not authorize the courts to change the existing statute.

Mr. Thomas. Here is the matter that I want your opinion upon, Senator. Section 8 of the Constitution of the United States enumerates the various powers of Congress, and, among others, subsection 9, " To constitute tribunals inferior to the Supreme Court," and subsection 18 of that section reads as follows:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

I would like your opinion about that.

Mr. ROOT. My opinion is that we are executing that provision of the Constitution in this statute by relieving the courts from the requirement which we have already imposed upon them, to conform the practice in common-law cases to the practice of the several states.

This statute which we have already made constrains the courts; and this bill, if passed, will be a substitute for the statute, or will modify the statute, so that by law the courts may make rules to govern the procedure in common-law cases as well as in equity cases.

Mr. THOMAS. You know that under the Constitution the Congress has the right to declare war. Do you think they could delegate that right to the Supreme Court of the United States ?

Mr. ROOT. No.

Mr. THOMAS. Why have we not the power to delegate this very right ?

Mr. ROOT. The way in which Congress does declare war is to authorize the President to use the armed forces of the United States to accomplish a particular purpose, and this is exactly analogous to that.

We, by law, provide that the Supreme Court of the United States shall make the rules in relation to the practice. The whole progress and development of our Government is necessarily toward a greater measure of delegation of authority. As our Government becomes more vast and complicated and the problems more difficult to understand, and as more and more duties are imposed upon Congress, it becomes necessary to delegate more and more authority. That is the inevitable result of a higher and wider organization.

We can, ourselves, no longer consider and pass upon matters of detail. We delegate to the Interstate Commerce Commission the power to do things which, in the beginning, the legislators and Congresses did themselves. And they are

dealing with a vast transportation problem with the exercise of exceedingly wide discretion.

And we have just delegated to the Federal Reserve Board enormous power in regard to the banking interests of the country. We are now considering a measure for a trades commission, to which, if the bill passes, necessarily will be delegated very broad powers.

It is the inevitable course of the development of government in a growing country that the authority at the head must deal more and more with the general subjects, and must delegate the particulars more and more to other agencies. In accordance with that inevitable course of development it will leave this subject of making rules of practice to the courts which have to administer them.

Mr. McCoy. Mr. Root, suppose there is now on the statute books a statute which prescribes the forms of practice at common law. Would not Congress, by passing a bill like this, give the power to the Supreme Court, if it made an inconsistent rule, to repeal that section? Could not this affect the existing law without controlling future law?

Mr. Root. If I understand your question, I think it is quite competent for us to confer upon the Supreme Court the power to make the rule which would, by the operation of this statute, take the place of the present rule.

Mr. Volstead. Would that not be a delegation of power, and would not the effect of such a rule be that the Supreme Court might repeal? Can we confer that power?

Mr. Root. No; we do not. We change the law ourselves. The operation of the statute now pending will be to change the law, and it amounts to this, that the practice on the common-law side of the Federal courts shall conform to the state practice, except as it is covered by the rules of the Federal courts. That becomes the law if we pass this bill. We ourselves modify the existing rule by excepting from the

application of the rule those cases which are covered by the rules of the Federal court. If there were no statute on the subject, if we never had made the conformity act, the court would go on and make its rules.

The court does not derive its authority to make rules from an act of Congress. It is inherent in the exercise of judicial power. You constitute the court, you confer jurisdiction upon the court, either by the Constitution or by statute, and the court proceeds to exercise the jurisdiction. It must have rules; it must exercise jurisdiction in accordance with rules, and the court makes the rules. It does not require any authority from Congress.

The trouble about the rules on the common-law side now is that we have interposed a statute which prevents the courts from making rules which differ from the rules of state practice, and the effect of this proposed law would be to modify that hidebound, hard and fast statute which we have already passed, making it apply only to the cases which the courts had not covered.

Mr. Chairman, while I am here may I call the attention of the committee to another bill which has already passed the Senate?

The CHAIRMAN. We will be very glad to hear you on that.

Mr. ROOT. I thank you. I refer to the bill authorizing the bringing up to the Supreme Court of cases in which there has been a decision upon the constitutionality of an act, although the decision was in favor of the claim of Federal right. This is an act amending section 237 of the Judicial Code.[1]

[1] This bill, approved December 25, 1914, is as follows:

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section two hundred and thirty-seven of chapter ten of an Act entitled ' An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, is hereby amended by adding thereto the following:

" ' It shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and deter-

As section 237 now stands, when, in a state court, there has been a claim of right or immunity under the Constitution or laws or treaties of the United States, and the decision is against the claim, there can be a writ of error to the Supreme Court.

There have been some cases in which the decisions of the courts of last resort in states have been in favor of the claim, giving to the provisions of the Federal Constitution an effect which many people think the Supreme Court would not give to those cases. The notable case in that connection is the Ives case in New York, regarding the workmen's compensation act.[1] There the Court of Appeals of New York held that the statute which was before them was in violation, both of the New York state constitution and the Fourteenth Amendment of the Federal Constitution. Now, there are many people who think that the Supreme Court of the United States would not have held that that was in violation of the Fourteenth Amendment of the Federal Constitution. The people of New York have amended their constitution so as to obviate the objection made regarding that particular case,[2]

mination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States.' " (U. S. Stat. L., vol. 38, pt. 1, 63d Cong., 3d sess., p. 790.)

[1] Ives *v.* South Buffalo Ry. Co., 201 Court of Appeals *Reports*, 271; 1911.

[2] This amendment to the constitution of New York, adopted in 1913, reads as follows:

§ 19. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury

but there was no way in which the judgment of the Supreme Court could be obtained on that question, and the people of the state, many of them, have felt that they were resting under a decision giving a more drastic effect to the Federal Constitution than the Supreme Court of the United States, the guardian of that Constitution, itself would have given, and there has been no way to meet that.

There were, I think, six bills introduced in the Senate, all of which went to the Judiciary Committee, and that committee reported a substitute, which has passed and which is now before your committee.

The bills undertook, most of them, to give an unlimited right to appeal or to take a writ of error in such a case. We modified that by substituting for that unlimited right the jurisdiction in the Supreme Court of the United States to bring up a case by a writ of certiorari or otherwise, using the language in which the authority to take up cases from the Circuit Court of Appeals by certiorari was given.

The idea of that modification was that the unlimited right would load down the calendar of the Supreme Court of the United States with a vast multitude of cases in which an appeal was taken for purposes of delay, and that in every case of public importance and concern involving a constitutional question the Supreme Court would exercise its jurisdiction.

results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Amendment of 1913 to the Constitution of New York, Article I, Section 19.)

There is very great public interest in the subject, and it is, I think, a matter which is of importance, not with reference to any private interest at all, but with reference to having the law made fixed and certain, and I invite the attention of the committee to that bill.

The CHAIRMAN. The bill you refer to, Senator, is Senate bill No. 94 ?

Mr. ROOT. I think it is.

The CHAIRMAN. That is an act to amend an act entitled "An act to codify, revise, and amend the law relating to the judiciary," approved March 3, 1911, which appears to have passed the Senate January 21, 1914.

Mr. ROOT. Yes; that is it. It adds a clause to section 237 of the judicial code. If that is passed, the effect would be that when a Federal question is raised in a state court, if the decision is against the claim of right under the Constitution or laws of the United States, there is an absolute right to take a writ of error, while if the claim is in favor of the right, then the Supreme Court has, nevertheless, jurisdiction to bring up the matter.

I thank you very much, Mr. Chairman, for giving me the privilege of expressing my views on this subject.

THE LAYMAN'S CRITICISM OF THE LAWYER

ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION, AT THE ANNUAL MEETING IN WASHINGTON OCTOBER 20, 1914

THERE is food for thought in the colloquy on Blackheath:

DICK THE BUTCHER: The first thing we do, let's kill all the lawyers.

JACK CADE. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? that parchment, being scribbled o'er, should undo a man? [1]

To these simple rustics, who had real grievances, the lawyer and his proceedings seemed a barrier in the way to that happy day when there should be in England seven half-penny loaves sold for a penny and the three-hooped pot should have ten hoops. That plain unlettered men should have this feeling in England, when the justice to be administered was the king's justice and the law to be enforced was the king's law, may not have made so much difference; but the existence of such a feeling in America, where the justice and the law are established, maintained, and enforced only by the authority of the very people among whom the feeling is found, is of very great importance.

Doubtless such a feeling does exist. We lawyers are quite apt to feel about our law and procedure very much as Lord Coke did when he declared the common law to be the perfection of reason. But if we were to poll the great public outside of the profession I fear that we should find an uncomfortable number who, in a mild way, agree with Dick the Butcher. We hear many casual complaints made by intelligent persons, based sometimes upon experience and

[1] *Henry VI*, Part II, Act IV, Scene 2.

sometimes upon observation. They say the law is slow and dilatory; that it takes forever to reach a conclusion; that redress of wrong is often attained, if at all, too late to be of any use; that when criminals are finally brought to justice the punishment is too far removed in time from the crime to have just punitive effect. They say the law is enormously expensive; that whether a suitor succeeds or is defeated he is likely to be ruined either way by the multiplication of counsel fees and costs and expenses and loss of time and interference with business; that the client has no means of measuring or weighing or estimating proper compensation for the services rendered to him, so that fees are vague and indeterminate and the man of moderate means has no way of counting the cost before he goes into litigation; that the law is so arranged as to require, even in simple matters, an enormous and disproportionate amount of labor which has to be paid for; that everybody's lawyers do a multitude of things for which there seems to be no occasion and for which the client has to pay. They say the law is doubtful and uncertain; that with all the thousands of statutes professing to make it clear and all the tens of thousands of decisions by hundreds of courts declaring it and applying it, nobody seems to know what it is; that its administration is a lottery and depends upon the last guess; that the chances of injustice succeeding and of the criminal escaping are so great that judgment has little terror for the wrongdoer; that it has become so voluminous and complicated as to be beyond the comprehension of plain men, and no one knows how to conduct his affairs in such a way as to be sure not to violate the law or to protect himself under it. The remark, " This may be law but it is not justice," sometimes heard, indicates a sense that the rules of law which profess to secure justice in general too often prevent justice in the particular case and themselves point out the way in which the adroit and unscrupulous may conform to the law and avoid

being fair and honest. There is an idea that success in litigation depends not so much upon being right as upon being able to get the best lawyer, so that the ordinary honest man of moderate means has little chance against a very rich man or corporation, who can be indifferent to expense, or against the rogue, who can secure the most subtle and adroit attorneys and counsel. There is a very general feeling on the part of many who think they have a grievance to be redressed or an unjust charge to refute that if they could only tell their story immediately to somebody who was impartial and just they would get satisfaction; but that the courts and lawyers, for some reason or other, will not permit them to do this and insist upon involving them in long, expensive and ruinous proceedings.

For all these things lawyers are blamed, and this is very natural because at the bar, on the bench, in state legislatures and in Congress, and as experts influencing the opinions of the communities in which they live, lawyers have the greatest opportunity and consequent responsibility to prevent abuses and improve the administration of the law.

Not all these things are true. Some of them have a basis of truth but are overdrawn. Some of them are to a degree merely a statement of the conditions which are inherent in juridical controversy. The swift, inexpensive, certain, and just attainment of a result according to one litigant's ideas is quite likely to collide with the equally swift, inexpensive, certain, and just process by which another litigant expects to reach an entirely different conclusion in the same case; and some degree of delay, expense, and uncertainty and of injustice, according to the views of one litigant or the other necessarily ensues.

As a rule both litigants go into court, each seeing only his own side of the case and therefore finding it quite simple; each is confident of an easy victory and has the same attitude

towards the controversy as the people who at the beginning of a war cry, "On to Richmond," "On to Paris," "On to Berlin," and are surprised when the journey is retarded. The natural tendency under such circumstances is to criticise the conduct of the war.

Criticisms regarding the conduct of litigation having such an origin probably cover the greater part of the field of complaint. They do not, however, sink very deep in the public mind. There is a strain of practical good sense in the American layman which leads him to discount very heavily the expressions of litigants who have not had their own way, and there is abundant evidence that, under all the noisy fault-finding, the American people do respect and trust the American bar. They may well do so, for the bar is worthy of their respect and confidence. We may challenge all records past and contemporaneous to show in the preservation of order, the security of property, the protection of individual liberty, and the maintenance of the fundamental ideas of a system of jurisprudence, a degree of general efficiency higher than that we have attained in the United States through the service of the American bench and the American bar. Their standards of probity and honor are high. The occasional derelictions, which are inevitable among imperfect men, always come as a surprise and a shock to the community in which they occur. The independence and courage of the American lawyer befit the man who passes his life, not in suing for favors but in asserting and maintaining rights. He does not cringe before power. He does not fear the face of man. He knows no superior. The fearless frankness of his utterances in behalf of his client are so much a matter of course among our fortunate people that they pass without notice; but if we study the annals of those countries in which the bench and bar tremble under fear of political power we shall begin to realize how much America owes to the independence and courage of

her bar. Above all else the American lawyer has loyalty — loyalty to his client's cause. That cause is his, and to it his learning, experience, industry and skill are devoted ungrudgingly. Some of our chief faults are but the defects of this noble and attractive virtue.

If we go behind the surface of fault-finding and study the conduct of our people, we find a real attitude of respect and confidence. For every detractor, we find a thousand men and women who trust their lawyers implicitly in their most intimate and vital affairs with the frankness and confidence of personal friendship, and who are justified in their trust. Above the men of all other callings it is to the lawyers that the American people turn with the burdens and the responsibilities of political office. It is the members of the bar who chiefly are trusted to carry on the most important business the people have — their free self-government.

Nevertheless, I think we must concede that there is room for improvement in the administration of the law in this country. Abuses exist in widely differing degrees in different communities. As a rule they are much worse in the more populous and wealthy communities where life and affairs are more complicated; but every American community, as it moves along in its course of prosperous development, is passing into a condition in which the same abuses will naturally develop. Every part of the country, moreover, is coming to be more intimately interested in the administration of law in every other part. We are fast developing one comprehensive American judicial system and one American bar. It is worth while for all of us, from whatever states, to give serious consideration to these complaints about the administration of justice from whatever quarter they come. We are all so much alike that a serious abuse in one jurisdiction is pretty sure to indicate tendencies to be guarded against elsewhere. So far as complaints are wrong we should make a distinct and

conscious effort to show the public that they are wrong, and, so far as they are well founded, we should fix the responsibility and try to have the cause removed. In both cases this is very important to the profession and to the interests which its members guard. It is more important to each one of us than any case in which we can be engaged because the interests of every client we protect, the welfare of our profession, the enterprise and prosperity of the country, depend upon public respect for law and a general belief and confidence that justice can be obtained through our courts; that life and liberty and property are sure of protection. It would be very injurious to have established a popular habit of decrying and condemning and stigmatizing our administration of justice and the agents through whom justice is administered. That would tend to weaken the whole system through the withdrawal of public confidence. Wherever people are wrong in their criticisms, that ought to be shown, and wherever they are right the conditions ought to be remedied.

The profession of the law can fix its attention upon this subject only by a conscious effort. Lawyers are essentially conservative. They do not take kindly to change. They are not naturally reformers. Their time is occupied mainly in thinking and arguing about what the law of the particular case is; about what the facts of the case are. The most successful lawyers are, as a rule, continually engrossed in their own cases and they have little time and little respect for the speculative and hypothetical. The lawyers who have authority as leaders of opinion are men, as a rule, who have succeeded in their profession, and men naturally tend to be satisfied with the conditions under which they are succeeding. This is very well illustrated by some of the experience of this association. For years the association has been endeavoring through the activity of very able and assiduous committees to secure some quite simple reforms tending to

simplify the procedure of the Federal courts. There has not been very much success. As time passes a little progress is made. The measures which the committees of the association have advocated have got a little farther each year, and they will ultimately arrive, but at every stage they have been blocked by opposition from lawyers. This has always come from lawyers who had succeeded and were content with things as they were; who did not want practice and proceedings changed from that with which they were familiar, and who never had acquired the habit of responding to any public opinion of the bar of the United States. If the administration of justice in the United States is to improve rather than to deteriorate, there must be such a public opinion of the bar, and it must create standards of thought and of conduct which have their origin not in the interest of particular cases but in the broader considerations of those relations which the profession of the law bears to the administration of justice as a whole. Not merely the fee and the triumph in the particular case, but the honor and dignity and service of the American bar and the American courts must be motives of thought and action among the members of our profession.

What can the bar do to improve the administration of justice in the United States? First, we can improve our lawmaking. We make too many laws. According to a count made in the Library of Congress, our national and state legislatures passed 62,014 statutes during the five years from 1909 to 1913 inclusive. During the same five years 65,379 decisions of the national and state courts of last resort were reported in 630 volumes. Of these statutes 2,013 were passed by the National Congress, and of these decisions 1,061 were rendered by the Supreme Court of the United States. Many of these statutes are drawn clumsily, carelessly, ignorantly. Their terms are so vague, uncertain, doubtful, that

they breed litigation inevitably. They are thrust into the body of existing laws without anybody's taking the pains to ascertain what the existing laws are, what decisions the courts have made in applying and interpreting them, or what the resultant of forces will be when the old laws and the new are brought together. They are made without the true basis for general legislation in the customs and needs of the community to be affected. Laws affecting the conduct of life and affairs of the people ought not to be passed because it happens to occur to some one that it would be a good thing to make a change. They ought to grow out of a generally recognized public need for the change, ascertained not by a process of reasoning but by experience. A new law is not justified merely because somebody sees an evil or inconvenience and thinks that he has a way to reform it, or because a system works badly and some one thinks another system would work better. Laws made in that way bring new inconveniences and new evils and have to be abandoned or continually changed. Changes in the substantive law ought to be subject to long-continued inquiry and discussion. They ought to be tested by the practical knowledge of the people who will be most affected by them and are most familiar with the subjects to which they relate. Every one familiar with legislation who has seen a proposed statute subjected to that kind of process knows that it often results either in ascertaining that the proposed law is inadvisable, or in very great changes of its provisions. It frequently happens that when a law has been passed in that way, one can look back to the original measure, whose authors had been clamoring for immediate enactment, and see that as originally framed it was all wrong and would have been most impracticable or injurious. Yet thousands of laws are passed in the United States every year without being submitted to any such test. We are coming very much into the habit of this kind of *a pri-*

ori legislation, passing laws which somebody has conceived or reasoned out because they seem all right theoretically. There is a very prevalent idea that the people who would be most deeply affected by a law are disqualified as witnesses regarding its wisdom, practicability, and effect, because of their interest. If they see that a law affecting them is proposed and undertake to say what they think about it they are accused of lobbying and warned off the premises. Yet when all the different groups of people who will be affected by particular laws are put together they constitute the American people, and if laws are to be made without hearing them we shall have a body of statutes based upon theory and not upon practical knowledge of affairs. All this mass of ill-considered, badly-drawn, experimental, first-impression legislation with which the country is flooded from year to year causes innumerable litigations which clog the calendars of the courts, occupy the time of judges, and delay the disposition of other litigation. It creates new questions faster than the courts can decide old ones. It causes ignorance and uncertainty regarding the law, which is continually changing; and the multitude of new laws is one of the chief reasons for the multitude of reported decisions.

One of the most learned and able and pure lawyers in all the history of the American bar was Charles F. Southmayd, of the famous firm of Evarts, Southmayd and Choate. He retired from practice and took up his residence in Stockbridge, Massachusetts, and while living there he illustrated the effect which this new turmoil of legislation produced upon an old-fashioned lawyer by employing an agent to attend the sessions of the Massachusetts legislature every winter and to report to him immediately upon their passage all new laws creating offenses or imposing penalties — " man traps " he used to call them — in order that he might regulate his conduct in such a way as to keep out of jail.

Undoubtedly there is much reason in these later days for new legislation. Our social and industrial conditions are changing very rapidly. New relations, new rights, new obligations, are being created for the regulation of which the old laws and customs of the country are inadequate, and there must be new law to prevent injustice. Nevertheless there is no real need or justification for a large part of the laws that are made or for the way in which they are made.

There is another most unwise kind of legislation which is one of the chief causes of uncertainty in our law and of the excessive litigation which so burdens the courts. That is the modern practice of perverting state constitutions from their proper office to establish the framework of government and declare the principles upon which it shall be conducted, and of expanding so-called constitutions into general statutes crowded with particular and detailed provisions, many of them new, experimental, and the proper subject for treatment by ordinary legislative bodies. With this kind of provision go a multitude of specific limitations upon legislative powers. These limitations give rise to a multitude of questions as to the constitutionality of legislative acts. They can receive effect of course only through the judgment of courts as to the conformity of legislative action to their requirements. Both of these kinds of constitutional provision arise from distrust of legislatures, which goes far beyond any criticism of the courts or of the bar; but in this way there is created a condition of things in which the courts and the bar cannot possibly escape criticism for defects in the administration of law which are not of their own making. Such a basis for the conduct of popular government ought not to be accepted as final.

Sometime we shall realize that salvation does not come by statute; that prompt and effective administration of justice must rest upon stability and certainty of the law; that over-

legislation defeats its own purpose by the uncertainty and confusion and ineffectiveness which ensue; and that the proper function of the legislator is not to command or compel the people whom he serves, but is, on the one hand, to record the matured opinions and sense of justice of the community, and, on the other, to make these effective by the needful adaptation of the machinery of government.

Of course all this is not a matter to be dealt with by lawyers at the bar. Courts cannot apply the remedy, nor can lawyers as officers of the courts. But lawyers probably make up the majority of every legislative body in the United States; and moreover the opinions of lawyers in their own communities on such a subject as this will have a great effect in forming the public opinion which controls legislatures.

There are certain specific measures by which American legislation may be greatly improved. One is, the establishment of a reference library for the use of each legislative body, with a competent library force to furnish promptly to the legislators statistics, historical data, and information of all kinds pertinent to proposed measures. Another is, the establishment of a drafting bureau or employment of expert counsel, subject to be called upon by the legislature and its committees, to put in proper form measures which are desired, so that they will be drawn with reference to previous legislation and existing decisions of the courts; so that they will not duplicate existing statutes, will not be inconsistent with existing statutes, will not ignore the decisions of the courts, will not undertake to do anything in one way which is already done in another, and will be written in good English, brief, simple, clear, and free from ambiguity and inconsistency. There is a useless lawsuit in every useless word of a statute, and every loose, sloppy phrase plays the part of the typhoid carrier. A good many American legislatures have already established reference libraries and some have estab-

lished drafting bureaus to the great advantage of their legislation. The state of Wisconsin has taken a very creditable leadership in that direction. This is the same kind of method which is followed in the British House of Commons, where there are regular counsel employed by the Government to draft measures. It is manifest that a large part of our legislators must be without the thorough knowledge of the whole field of law and the training in clear and accurate expression which ought to be employed in the phrasing of every new statute. If ever expert assistance was needed, the conditions of legislation in the United States at the present time show that our legislators need it in their lawmaking. One of the reasons why our legislation is so badly done is that this craze for making new laws upon every conceivable subject overburdens our legislative bodies, and they have not the time to do their work properly. Laws are not properly considered in Congress or in our state legislatures because everybody is always busy about other laws, and, instead of a moderate output of legislation well-considered and well-done, we have an enormous output of ill-considered legislation ill-done. The remedy for this cause of the evil is to cultivate public opinion in favor of moderation and against haste and excess in lawmaking. Public commendation of the one and public condemnation of the other would soon bring about an improvement.

Another thing the bar can do is to simplify the procedure of our courts. There is a very great difference in this respect in the states. Taking the country as a whole, judicial proceedings tend to become more complicated and technical. In some parts of the country, notably in my own state of New York, this tendency has already reached a point of serious abuse. The tendency is one which has existed in every system of jurisprudence from the Egyptians down. The special class to which is committed the guardianship of the law

always drift away in time from the standards of the plain people whom they serve, always become subtle, technical, over-refined; and the forms which they originally adopted to facilitate the process of getting at substantial justice come to be themselves the subject of controversy which obstructs the way of justice.

The administration of law in America had become very technical seventy years ago, although the conditions of life and business with which the courts and the bar had to deal were comparatively simple. The rules which governed the pleadings and proceedings of the common law both in civil and criminal cases, were founded originally upon reason and adapted to the conditions out of which they arose. They were designed to protect rights and to facilitate the attainment of justice, but they had hardened into an iron-bound system which had ceased to fit the rapidly developing and changing life of American communities. People who were accustomed to simple and direct methods in their business grew tired of waiting and paying for lawyers to dispute over answers and pleas and rejoinders and rebutters and surrebutters, and tired of seeing criminals escape justice because the caption of an indictment was defective or a venire was informal. From that dissatisfaction grew the Field Code of civil procedure in 1848, which was followed by the greater part of the American states in what was known as the reformed procedure. The influence of that code made the civil practice more simple even in the states which did not adopt it but continued with the common-law practice. The code was brief, simple, quite general in its terms, and it swept away a whole mass of technical details and conformed the practice of law to the customs and habits of thinking and acting of the American people. That is the true basis for procedure. The old common-law procedure was logical in a high degree, but man is not a logical animal. The Ameri-

can man especially is intensely practical and direct in his methods. American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute, and go to him and tell their stories and accept his judgment. Of course all practice cannot be as simple as that; but that is the standard to which we ought to try to conform rather than the methods of an acute, subtle, logical, finely discriminating, highly trained mind. It is that sort of thing which merchants seek when they get up committees of arbitration to decide their controversies without the intervention of lawyers. They are trying to get their questions settled in accordance with their instincts and habits of thought. That is the way in which all the great international arbitrations are conducted. Fortunately for them, the judicial procedures of the nations differ so widely that there cannot be any particular rules of practice in an international case. Accordingly each country tells its story in print and then both go in and tell the arbitrators about it. Many of these cases are exceedingly complicated and difficult, but they require no complicated and difficult procedure.

During the sixty-odd years which have elapsed since the reform of American procedure by codification there has been a constant movement towards the same old condition of complex and technical procedure, caused by legislative interference with the details of practice. In many states, year by year, well-meaning lawyers have been putting new provisions into codes of procedure, expanding, elaborating, refining, telling how everything shall be done, how every step shall be

taken, how every paper shall be framed, endeavoring to meet every difficulty encountered in individual practice by a new provision of law. The New York code, as a horrible example, has been swelled in this way to more than eight times its original dimensions. Most of these enactments have been made in entire good faith. Many of them prescribe methods appropriate to secure or prevent the doing of particular things in the course of litigation, provided they are strictly and accurately followed. The general result, however, is that in all litigation in these jurisdictions we have a vast multitude of minute, detailed, technical rules that must be followed; traps to catch the unwary; barbed wire entanglements; barriers which the subtle and adroit practitioner can interpose to hinder the pursuit of justice. Because these rules are statutory they create statutory rights. A multitude of controversies about these statutory rights intervene between the suitor's demand for redress and his final judgment. Rights created by statute cannot be ignored by courts. Parties must be heard about them. The question upon them is, not what accords with substantial justice in the particular case, but what the law has said shall be done in such proceedings. So the time of courts is occupied, delay is incurred, expense is increased. While the law is enforced, justice waits. The suitor who is right in his case may be wrong in his practice. The courts are hindered in doing justice because they must follow the statute. There is a premium on shrewd, ingenious, shifty attorneys. The possibilities of delay and of forcing a compromise to avoid expense and annoyance induce litigation by those who wish to escape the faithful performance of their contracts. The calendars are crowded with such cases. In such a game the poor stand little chance against the rich, or the honest against the unscrupulous. The process of piling up more statutory rules continues in state legislatures. It has invaded Congress, and from many quar-

ters efforts are coming to impose more and more specific rules upon the Federal courts. Such proposals are made by good lawyers and they are made in good faith, but they are made without due consideration of the fact that each one is a step in the course of a vicious policy which ought not to prevail. There is no necessity for all this bedevilment of our practice by law. A short and simple practice act in each jurisdiction — such as some states have already — laying down the general lines of procedure and leaving the rest to the courts, is all that is necessary. The courts wish to do justice, and they will if they are permitted to. If rules are necessary the courts will make them and then the courts can see to it that they do not hinder justice. It is to be observed that the great lawyers in great causes concern themselves the least about technicalities. The small lawyers in the small cases are the worst, and that is just where the clients can least afford such methods.

There was intense opposition to the simplification of practice by the Field Code of 1848. Most of the old lawyers were violently against it. In my early days the leaders of the bar had all grown up under the common law practice before the Code, and they despised and condemned the new ideas. Time and again I have heard them, in consultation with the author, describe the book as "your damned code, Mr. Field." But it is not the high priests of a mystery who determine whether it shall continue. It is the people who are either fooled by it or tired of it. They determined seventy years ago that practice should be simpler. And twenty-five years later the reform was followed in England by the Judicature Act of 1873. There is opposition to any improvement of our present system of practice in the direction of making it more simple. But the people of the country whose rights are being litigated will sooner or later find expression and guidance in bringing about again the same kind of reform which Mr. Field inaugurated in 1848.

There is one special field in which I think we can greatly reform ourselves. That is, in the application of our rules of evidence. I should not like to see broken down the carefully framed series of negations by which we seek to exclude from the knowledge of judges and jurors all testimony which does not conform to our conceptions of proper probative character, leaving the testimony in our courts to take the wide range that characterizes trials on the continent of Europe; but there is no country in the world in which rules for the exclusion of evidence are applied with the rigidity and technicality obtaining in the United States. England and her colonies which follow the course of the common law have similar rules, but they are applied with a breadth and liberality in favor of getting at the truth not usually found in our courts.

Our trial practice in the admission and exclusion of evidence does not agree with the common sense, the experience, or the instincts of any intelligent layman in the country. And as a consequence, while we are aiming to exclude matters which our rules declare to be incompetent or irrelevant or immaterial, we are frequently also excluding the truth. How common it is to see an unsophisticated witness on the stand trying to tell a true story about some event with which he is familiar, and continually stopped and bewildered by objections based upon distinctions which do not exist in his mind at all, and finally leaving the stand with a feeling that he has been bottled up and not allowed to tell the truth. We apply these same rules with the same rigidity to women, whose minds work in an entirely different way from the mind of any lawyer who ever had anything to do with devising or developing the rules of evidence. It is an exceedingly difficult thing to tell the truth, the whole truth, and nothing but the truth, on the witness stand, as any lawyer who has been a witness must realize; and the simplest and best way to get that done is to come as near as possible

to allowing people to tell their stories their own way. When that is done the matters which have no proper probative effect can be disregarded. So far as my observation goes, there are about twenty objections to the admission of evidence in a trial in an American court to one in an English court. The system of law is the same; the rules are the same. The difference is simply that we have got into a bad habit, and we ought to cure ourselves. It does not help a case any on the merits to be so technical about evidence. On the contrary, it hurts the case with judges and juries, and it ought to do so because there is a fair implication that the lawyer who is so very particular about little points is not very confident in the merits of his case.

The rule against reversals except for causes which can be shown to have affected the decisions in the court below will have a salutary effect in this direction, and it has already had such an effect where it has been adopted. But even with such a rule our bad habits will continue unless we remind ourselves of them and try to break them.

I think there is a broader defect in our trial of causes in this, that we are too apt to play a game instead of trying to get down as rapidly as possible to the merits of the case. And we play the game for all it is worth. We enjoy the exercise of skill and the strategy and tactics of litigation. The lawyers on one side or the other of a large part of our litigations consider their duty to be to postpone to the latest time practicable a possible adverse result. So we make our lawsuits a game of chess where they are not a game of chance. Indeed it is a most interesting and delightful game, but in the meantime the clients suffer. Unquestionably it would be best for all litigants taken as a whole and for the public whom we serve, if every lawyer should address himself with earnestness and sincerity to getting out the true facts of his case and getting the law applied to them as speedily and simply as

possible. If we could all do that we could beat Dick the Butcher and Jack Cade on their own heath. Perhaps a sound opinion of the bar may bring it about.

We must remember that if we are conscious of faults which perhaps are trivial among the lawyers who have the public spirit to become members of this association, those faults are sure to be more serious and injurious in those members of the bar who take but little interest in the public aspect of their professon; the lawyers who are in the lower grade as to attainment and cultivation; who are but little familiar with the traditions of the profession, and are having a hard time to get on with scanty business; the lawyers whose stock in trade is knowledge of the code and skill in the obstructive use of its provisions; the lawyers whose clients are found chiefly in that great class which seeks to prosper by doing injustice to others and uses the technicalities of the law to further that end. Among them there is always the danger that the necessities of the game will urge too far; that they will yield to the same influence which leads one man to strike below the belt, another to fire before the word, another to slip a card from the bottom of the pack. That danger is to be reached not by more legislation, but by the public opinion of the bar, open discussion of the ethics of the profession, active insistence upon standards of conduct.

We are in a period of universal development. All business, all science, all thought, are casting off old shackles and impediments and improving their methods, increasing their efficiency, lifting up their standards. It should not be that our noble profession is alone to remain stationary and without growth along the lines of better service and greater usefulness.

THE SPIRIT WHICH MAKES A NATION LIVE

ADDRESS AT THE DINNER OF THE AMERICAN BAR ASSOCIATION, WASHINGTON, OCTOBER 22, 1914

At the banquet following the thirty-seventh annual meeting of the American Bar Association, held in the city of Washington, October 20, 21, and 22, 1914, the president of the association, the Honorable William H. Taft, former President of the United States, acted as toastmaster, and, in introducing the last speaker, he said: "It is my great pleasure to ask to respond to the toast which the Chief Justice has proposed, the leader of the American bar. If he does not recognize himself, I will call him by name — Senator Elihu Root."

A FEW years ago I dined in one of the most charming and hospitable of our American cities and was called to my feet to respond to a toast about two o'clock in the morning; at three o'clock the banquet ended; and as we started to leave, a gentleman who sat next to me said, in a tone which indicated that he did not think I was much of a fellow anyway, "Last year when Taft was here we didn't break up until four o'clock." We are approaching the same hour now.

Yet I will say one or two things. One is to the Chief Justice: that I am glad he has applied to the old tradition the sentiment of Henry V to Catherine, "Nice customs courtesy to great kings." And one thing that I wish to say to my brethren of the bar: that this great meeting, so rich in unusual experiences, so full of instruction and of inspiration, will have missed its purpose unless we can go back to our homes and carry to the people among whom we live, some message that will lift them all a little higher in patriotism and give them all a little truer conception of service to our country. The message that I hope may be carried is this: that they should better appreciate and prize and pride

themselves upon the highest and noblest function of American democracy. This is not in creating a great material civilization; it is not in building railroads or breaking the prairie or clearing the forests; it is not in building schools or hospitals; it is not in making laws; it is not in administration; it is not in simple, right living and the performance of duty one to another; but it is in the great function of establishing, to rule the lives of the present and the future, a standard for the morality and the conscience of the world. It is in declaring those principles of action, those eternal laws of justice and liberty which we embody in our constitutions, and call limitations upon official power. That function differs in kind, not merely in degree, but in kind, from all other acts of government, from all other acts of citizenship; for it must be abstract, impersonal, detached from all interests and affections and the minor motives that sway the conduct and the affections of men; it must be impersonally abstract as the laws of God.

We never have realized the sanctity of the making of the Constitution. For all time the world has been disputing upon the data of ethics. What is morality? What are its laws? What is justice? What is right as between man and man? Are we to find it in the laws of nature? Is it natural justice? Who shall declare it? Is it the greatest good for the greatest number? Who shall say what is the greatest good? Millions of men are today fighting and dying over hundreds of miles of the fairest land in Europe, because of different understandings by people of different nations of what are the fundamental rules of morality which should control national action. Beyond and behind all the correspondence, the little things which are referred to, to show that this one or that one or the other was responsible for this dreadful war, are the fundamental differences of moral view as to the rights and the duties of nations. To be right, to set

for the world a standard of true liberty and true justice: that is the great mission of democracy! And that we propose when we set in our constitutions our conception of what is justice and what is liberty, and bind ourselves to conform our lives to the rules of conduct which that conception dictates. Our people do not appreciate the dignity and the honor which is theirs when they perform this solemn act of declaring the principles of government.

Our ordinary political acts are swayed by personal feeling. We elect the most popular man. We pass laws that would benefit this, that or the other locality or class. It is a constant struggle to keep out of the decisions of a jury, and, indeed, often the decisions of the court, the influences of personal feeling and personal predilection.

All these things are but the ordinary course of life. Above them all, rising into that field where men look to revelation, the sovereign people act, when for all peoples and for all time and for all nations, divesting themselves of sympathy and affection, of hatred and revenge, of selfish interests and impulses, abstractly, impersonally, they declare the principles of national morality in that voice which then and then only as the voice of the people is the voice of God.

The perpetuity of a nation depends not upon its material petty achievements; it depends not upon its culture or its learning; not upon its castes; not upon its right living alone. It depends upon its finding for itself the secret of the world's life, upon its finding for itself the spirit, the informing spirit, which makes a nation to live because it is doing the work of the Divine Ruler of the Universe.

And the declaration of that spirit, the answer to that vital and eternal question, the people of the United States of America embodied in the great rules of justice of their Constitution. We should spurn with contempt the idea that the discharge of that great office, the performance of that

supreme duty, should be lowered to the grade of ordinary conduct and subjected to the influence of ordinary impulses and interests. Let us keep it separate and apart, let us sanctify it and prepare ourselves for it by love of country and of kind, and by devotion to the principles of liberty and justice, and never treat as tolerable the attempt to degrade that great function to the ordinary level of the market-place, of the quarrel, of the selfish interest. There lies the life or there comes the death of our beloved country. It is for us whose lives are cast in such lines that we can see and feel the difference between that high function and the ordinary things of life, to teach our friends and neighbors the secret of the great judgment of our free democracy, that they may reverence it and preserve it always.

THE LAWYER OF TODAY

ADDRESS BEFORE THE NEW YORK COUNTY LAWYERS ASSOCIATION, NEW YORK CITY, MARCH 13, 1915

In 1899, after the resignation of General Russell A. Alger, Secretary of War in President McKinley's Cabinet, Mr. Root, then practicing at the New York bar, was offered the portfolio of war under the circumstances and for the reasons stated by Mr. Root himself in the following address. Mr. Root served as Secretary of War from August 1, 1899, to February 1, 1904, when he resigned in order to resume the practice of his profession in New York. Upon the death of the Honorable John Hay, Secretary of State, Mr. Root was invited by President Roosevelt to become Secretary of State, and was commissioned as such July 7, 1905. He resigned this office on January 27, 1909, after his election as United States Senator by the legislature of New York, for the term beginning March 4, 1909, and ending March 4, 1915. Upon the completion of his term in the Senate, he returned to New York, where his homecoming after an absence of sixteen years, with a few months' interval, was greeted and celebrated by his former associates of the bar.

I FIND it difficult, impossible, to express adequately the feeling which I have in this greeting on my return to my home, and to the bar in which, forty-eight years ago, I cast my life and centered my ambitions. It is very delightful for me, after years of absence, to find here this great association of the bar which marks by its activity and its enthusiasm the growth of a common spirit and a common purpose among the members of the profession, upon which I feel rests the highest responsibility and the most imperative duty for the welfare and the future development of our country.

I do not feel that I have ever left the profession. If you will pardon me for repeating an incident, somewhat personal, I may illustrate the reason why I feel that I have never left the profession. Sixteen years ago, in the month of July, having just finished the labors of the year and gone to my country home, I was called to the telephone and told by one speaking for President McKinley, "The President directs me

to say to you that he wishes you to take the position of Secretary of War." I answered, "Thank the President for me, but say that it is quite absurd, I know nothing about war. I know nothing about the army." I was told to hold the wire, and in a moment there came back the reply, "President McKinley directs me to say that he is not looking for any one who knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants." Of course I had then, on the instant, to determine what kind of a lawyer I wished to be, and there was but one answer to make, and so I went to perform a lawyer's duty upon the call of the greatest of all our clients, the Government of our country.

And I have never felt for a moment that I have stepped outside of the noble profession to which I had intended to devote my life. It was a fascinating work. It was the work of applying to some ten millions of people in Cuba and Porto Rico and the Philippines, the principles of American liberty. They were living under laws founded upon the customs of their lives, customs drawn from old Spain and developed in social and industrial activity quite unlike that of the United States; and the problem was to make those principles which are declared in our constitutions, which embodied the formative idea of the Declaration of Independence that all men are endowed with inalienable rights among which are life and liberty and the pursuit of happiness, to the customs and the laws of peoples which had come down from the Spain of Philip the Second and the Inquisition. Those principles were alien to their thoughts and their conceptions, to their habits of life, to their ideas of the relations between men and between men and their governments. In the first instance they had to be applied at the hand of the military officers who had their own code and methods of procedure. It was

a test not to be undervalued, of the vitality, the universality, and the essential truth of the principles themselves. Through the strong and sagacious control of Governor Taft in the Philippines; through the sound administrative instincts and devotion to duty of Leonard Wood in Cuba; through the loyalty of George W. Davis, and his successors in Porto Rico, those principles of justice, principles of state morality, which we have embodied in our constitutions, constitutions which are but the expression of the conception of individual liberty that has grown through a thousand years of Anglo-Saxon freedom, proved still to be vital, and the laws of these Spanish countries received, embodied and made effective the preservation of individual liberty and the protection of the individual against the tyranny of government. The ideas that were forced upon King John when he signed the Magna Charta, — that great and conquering conception of liberty which has been the formative power moulding the social and political life of the hundred and ten million people who inhabit this continent north of the Rio Grande, — prevailed and became effective as applied to the daily life, the protection, the prosperity and the happiness of the little brown brothers in the Philippines; of the men whom we fought the war of 1898 to liberate in Cuba and of our wards in Porto Rico. Surely no lawyer was ever more fortunate than in the opportunity to help in the demonstration of the eternal verity of the principles of justice and liberty which underlie all the efforts and the struggles of our American bar.

Now I return. I escaped once after going to Washington, but was caught and carried back, and now I have come again. Forty-eight years after my entrance to the bar, I have come again to my old home to meet the faces and the friendship of many an old associate and to take my accustomed place with my brethren at the bar of New York; but I find here that there are new conditions to which the old principles are to be

applied, conditions which did not exist, which never entered our minds in those early days, when, almost a boy I sat at the feet of Choate, of Choate with all the charm and power of his young manhood; Choate the inimitable, the incomparable; always our leader. Then we thought only what is the law, the underlying principles were never questioned, the only duty was to reason straight from them to the conclusion which would win our client's case. But now the postulates are all denied. The foundations upon which we builded are questioned; we are told that our laws put the dollar above the man, a rhetorical expression which I suppose means that one man's right to a dollar is to be regarded as higher than another man's right to five dollars. We are told that liberty of contract is to be regarded as limited by the incapacity of the citizen to make a contract which will be injurious to him. We are told that the liberty of the individual must be subordinated to the obligation to conform his conduct to the conduct of a class, with the natural corollary and further step that the state, the greatest of all classes, is everything and the individual is nothing. We find here and there and everywhere doubt, which means, if it means anything, a question whether there is any standard of right, whether there is any basis of ethics apart from the will of a majority. All the bases of our profession are subject to reëxamination. Who is to do it? Who is to lead in it? Who is to do the thinking and the teaching and the arguing and the persuading? Can the bar now confine itself to the interests of the particular case? Can the lawyer of power and intellect now satisfy his conscience by devoting his life solely to determining whether his client or another's shall have so much money or so much property? Ah, in this new era the duties of the bar have multiplied and changed in their character. We must make the people of our country believe again in the jurisprudence

of their country. It is not enough to quote decisions. All this vast multitude of judicial decisions that have been piled up year after year and generation after generation, do not suffice. No country can have its laws enforced unless the people of the country believe in them. Recall something that has occurred to all of us. We think of the old judges in those strong, terse decisions long ago when without quoting precedents, or arguing about what others had said, they stated what ought to be so and made it so by their decisions. We have got to carry the people of our country again through such a process as that, so that they will recognize the identity of our law with our justice. We must check the impulse seen too often among too many intelligent Americans, to think that we can get along by everybody's doing what is about right or what he thinks to be right; for no country can maintain its liberty, no country can maintain its industry without the certainty, the confidence, that rests upon an accepted and respected system of jurisprudence, and there can be no accepted and respected system of jurisprudence that is not maintained, defended and asserted by a bar of courage and devotion.

It is with inexpressible satisfaction that I perceive that the bar of my own state and city are equal to this new and larger duty. I recall the difference between the attitude of the bar towards the revision of the constitution of the state twenty-one years ago, and its attitude now. When we went into that convention of 1894, over which Mr. Choate presided with such charming humor, such lofty courage and such sublime indifference to the rules of parliamentary law, we went as one might have come out of the wilderness where he had been for months without word with a fellow-man; nobody thought about it beforehand, nobody paid any attention to it and the members of the convention had to evolve out of their

inner consciousness with the assistance of a few especially advanced cranks, all their ideas of what the constitution ought to be.

Now the whole state is alive. All the bar associations have been literally buzzing with discussion as to what the constitution should be. Commercial organizations, voluntary organizations for charity and education, and philanthropy, for business, for trade, for manufacture, all over the state have been busying themselves with the study, the consideration and the discussion of questions as to what our fundamental law should be. Where we had hundreds, I presume we shall be blessed with thousands of proposals for amendment of the constitution.

There has been a radical change in the attitude of the bar of the state towards public questions. The bar has risen out of its interment in the individual case, out of its concentration of interest in the success of plaintiff or defendant in the particular case, into a realization of its interest and its duty to the law; to the law by which we all live, by which our peace and order and prosperity and opportunity for all the blessings of civilization come; and upon my return, looking at you and your activities, with all the advantage of the detachment of these past sixteen years, I hail with gratification beyond expression the growth, the development, the enlargement, the ennobling of the bar of New York.

I remember in Oneida County, from which I came to this city fifty years ago to seek my fortune, the figures of a group of great lawyers. Samuel Beardsley, Hiram Denio, and Joshua Spencer seemed to me to be nobler than all the monarchs and generals and statesmen of the books. During these fifty years, I have known, and it has been my happiness to be the friend of a great succession, O'Connor, Field, Evarts, Carter, and Choate, worthy to carry on the great leadership that began with Hamilton and Jay and Kent. worthy to place

the bar of this greatest of states of the greatest of republics upon the high standard of devotion, ever illustrated by the words of Erskine, " I will at all hazards forever maintain the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence." I remember a few months ago seeing an account of a piece of pottery which was dug up in a recent excavation at Pompeii, on which some old fellow had recorded his lamentation because the old customs were passing away and everything was going to the devil. Sometimes I suppose we all feel as he did; but I cling with great tenacity to a belief in the eternal verity of the principles of Anglo-Saxon freedom, growing from Magna Charta, through all the struggles of the Commons of England, embodied in the American Constitution and the hope, I believe, of the liberty of the world. Against all cavil, against all doubt and despondency, I place for the preservation of those principles my confidence in the substantial integrity and loyalty of the bar of my own city, my own state, and my own country.

INDIVIDUAL LIBERTY AND THE RESPONSIBILITY OF THE BAR

ADDRESS AT THE ANNUAL DINNER OF THE NEW YORK STATE BAR ASSOCIATION, JANUARY 15, 1916

IT must have occurred to all of you that it is rather hard to sit through a long evening and hear praise to one's face. I hope you do not think that I really believe it all. It is a well-founded maxim that in practical affairs of life it is wise not to put so much stress on the grammatical construction of what people say as to try to divine the reason why they say it; and so I have taken all these things which have been said about me with a feeling that they denote the kindliness of old friendship and the generous warmth of loyalty to an old companion at the bar.

The world is apt to be all praise or all blame, and sometimes all praise alternating with all blame, and when the members of a profession or a calling impute to one of their number a multitude of noble qualities it is fair to infer that they are really expressing their own conception of what their profession is and what they would like their fellow-members to be; and in that conception of the true spirit and the noble character and the exalted purpose of the profession of the law, I am with you with all my heart.

I am just a lawyer, from the ground up, and everything that I have done in my life has been as an incident to a lawyer's career, responding to the calls made upon a lawyer under the responsibilities of his oath and his conception of a lawyer's duty.

I have been much removed from the activities of the profession for many years because the engrossing character of

duties in the Departments and in the Senate in Washington has been such as absolutely to forbid the giving of any time or strength to the practice of law, and now I have come back, I have come home to my old friends and my old haunts and taken up the old course of going up and down town daily, as I used to do forty or fifty years ago.

It is very grateful and delightful to feel that in my long absence I have not been forgotten; that for many an old friend who has passed away a new one has been found to take his place.

But I think I have come back to the profession with a little sense of detachment and with a view from the outside, looking at it as a whole, free from those prepossessions of interest in the particular case which absorb us so fully in our ordinary practice; and there is one thing that has during the past few months been filling my mind and that I would like to say to you: it seems to me that during the period of fifty years since I was first opening my eyes to the field of the common law under John Norton Pomeroy in this city a great new duty has come to the profession of the law.

We had then to appeal to established and unquestioned principles. The duty of the lawyer was bounded by that established, firm, impregnable barrier of legal principle: the application of the well-understood principles of law to the maintenance of his client's rights was the limit of his ordinary obligation. Now the whole field has broadened. Fundamental principles are questioned, doubted, discussed, possibly endangered.

Our country, which seemed then so secure, so peaceful, so certain in its prospect of prosperity and peace and order, is passing in under the shadow of great responsibilities and great dangers to its institutions.

We are no longer isolated. The ever-flowing stream of ocean which surrounds us is no longer a barrier. We have

grown so great, the bonds that unite us in trade, in influence, in power, with the rest of the world have become so strong and compelling that we cannot live unto ourselves alone.

New questions loom up in the horizon which must be met; questions upon which we have little or no precedent to guide us; questions upon the right determination of which the peace and prosperity of our country will depend. Those questions can be met only by a nation worthy to deal with them. They can be met by a democracy only as it is prepared for the performance of its duty.

Something has been said about the proposed constitution and its defeat. I give you my word that the instant the necessity of concentration upon the work of the constitutional convention had passed, my mind sprang back to these grave and serious dangers that threatened our country so completely that when the constitution was defeated it was a scarcely noted incident in my life.

How are we to meet the future, and what is the responsibility of the bar, that is the guardian of American law, toward meeting that future ? It is not a matter of opportunism; it is not a matter of temporary expedient. The situation cannot be dealt with by merely doing what seems to you and to me to be the expedient thing in this situation and in that situation today or tomorrow. Our people must base themselves upon a foundation of principle. They must renew their loyalty to ideals. And the basic principle is the principle of American law.

It is the principle of individual liberty which has grown out of the life of the Anglo-Saxon race and has been waxing strong during all the seven hundred years since Magna Charta. That was the formative principle that made America, the United States and Canada, from the Atlantic to the Pacific, from the Gulf to the frozen north, English speaking, pursuing the course of the common law, preserving liberty and doing

justice. That, the power of that principle of individual liberty that developed in the life of our race, is the greatest formative power in the history of the world. Over against it stands the principle of the state. Upon the one hand is the declaration in that great instrument, the value of which we hardly yet appreciate, the immortal Declaration, penned by Thomas Jefferson, that all men are created with unalienable rights, which governments are created to preserve. On the other hand is the principle that states are created with supreme rights which all individuals are bound to observe. The one centers the system of law and order and justice upon the inalienable right of the individual; the other centers the system of law and order and justice upon the rights of the state, which subordinates the rights of the individual, and that is the fundamental question which is being fought out upon the battlefields of Europe.

Here in this country we have enjoyed liberty and order so long that we have forgotten how they came. Our people assume that they come as the air comes, to be breathed; they have assumed that they will, of their nature and by their own force, continue forever, without effort. Ah, no! Liberty has always been born of struggle, it has not come save through sacrifice and the blood of martyrs and the devotion of mankind. And it is not to be preserved except by jealous watchfulness and stern determination always to be free.

That eternal vigilance is the price of liberty is such a truism that it has lost its meaning, but it is an eternal truth, and the principles of American liberty today stand in need of a renewed devotion on the part of the American people. We have forgotten that in our vast material prosperity. We have grown so rich, we have lived in ease and comfort and peace so long, that we have forgotten to what we owe those agreeable incidents of life. We must be prepared to defend our individual liberty in two ways. We must be prepared to do it

first by force of arms against all external aggression. God knows I love peace and I despise all foolish and wicked wars, but I do not wish for my country the peace of slavery or dishonor or injustice or poltroonery. I want to see in my country the spirit that beat in the breasts of the men at Concord Bridge, who were just and God-fearing men, but who were ready to fight for their liberty. And if the hundred million people of America have that spirit and it is made manifest they will not have to fight.

But there is another way in which we must be prepared to defend it, and this is necessary to the first: We must be prepared to defend it within as against all indifference and false doctrine, against all willingness to submit individual independence to the control of practical tyranny, whether it be of a monarch or a majority.

Now there are certain circumstances which tend toward weakening the allegiance of the American people to the fundamental principles upon which the law of America is based. One of them is that the changes in conditions have required and are continually requiring extensions of government, governmental regulation and control, in order to prevent injustice; and we naturally turn in the creation of these new and necessary regulations to those governments which have been most efficient in regulation, and those are the governments which sacrifice individual liberty for the purpose of regulating the conduct of men; and so the tendency is away from the old American principles toward the principles of bureaucratic and governmental control over individual life; a dangerous road for a free people to travel to attain necessary results, and the danger is that in attaining those results the true principles of liberty be lost sight of.

Another circumstance which we ought not to lose sight of is the fact that a vast number of people have come to the

United States within very recent times from those countries of Europe which differ so widely in their fundamental conceptions of law and personal freedom from ourselves.

The millions of immigrants who have come from the continent of Europe have come from communities which have not the traditions of individual liberty, but the traditions of state control over liberty; they have come from communities in which the courts are part of the administrative system of the government, not independent tribunals to do justice between the individual and the government; they have come from communities in which the law is contained in codes framed and imposed upon the people by superior power, and not communities like ours, in which the law is the growth of the life of the people, made by the people, through their own recognition of their needs.

It is a slow process to change the attitude of the individual toward law, toward political principles. It cannot be done in a moment, and this great mass of men, good men, good women, without our traditions, but with entirely different traditions, will change us unless we change them.

Fifteen per cent of the lawyers of this city are foreign born. Fifty per cent of the lawyers of this city are either foreign born or of foreign parents. And the great mass of them have in their blood, with all the able and brilliant and good and noble men among them — have in their blood necessarily the traditions of the countries from which they came. They cannot help it. They will hold those traditions until they are expelled by the spirit of American institutions. That is a question of time. And somebody has got to look after it. Somebody has got to make the spirit of those institutions vocal. Somebody has got to exhibit belief in them, trust in them, devotion to them, loyalty to them, or you cannot win this great body from continental Europe to a true understanding of and loyalty to our institutions.

The change may well be seen in our colleges and law schools, where there are many professors who think they know better what law ought to be, and what the principles of jurisprudence ought to be, and what the political institutions of the country ought to be, than the people of England and America, working out their laws through centuries of life. And these men, who think they know it all, these half-baked and conceited theorists, are teaching the boys in our law schools and in our colleges to despise American institutions.

Here is a great new duty for the bar, and if we have not been hypocrites during all these years in which we have been standing up in court and appealing to the principles of the law, appealing to the principles of our Constitution, demanding justice according to the rules of the common law for our clients; if we have not been hypocrites, we will come to the defense and the assertion — the triumphant assertion — of those principles upon which we have been relying.

All classes and conditions of men are organized, the merchants, the manufacturers, the bankers, the clergymen, the farmers, the laborers, actively interested in the promotion of the ideals of their class or their calling. It is for lawyers to perform the highest duty, for the ideals of their class, or their calling, are the ideals of our country's free institutions.

In the Association of the Bar of the City of New York, which we founded here forty-five years ago, and that admirable County Bar Association, which has broadened out from the old association; in the admirable success of the State Bar Association, over which you, sir, preside with such efficiency and grace; in the vastly increasing numbers of the American Bar Association, we can see steps toward the accomplishment of this high duty of our profession, for that duty cannot be performed by the lawyer alone immersed in the interest of a particular case; it can be performed only by stimulating and elevating a public opinion of the bar and

through that influencing the public opinion of the country. Who is there who can speak with such authority to the American people as the body of the bar, which represents them in the administration of the law of their country? Who is there on whom rests so great a responsibility for the preservation of the fundamental principles of the law, and who is there who, by tradition and teaching and the habits of their life, ought more gladly to accept the duty of making the fundamental groundwork of American liberty a reality among a devoted and patriotic people?

The whole business of government, in which we are all concerned, is becoming serious, grave, threatening. No man in America has any right to rest contented and easy and indifferent; for never before, not even in the time of the Civil War, have all the energies and all the devotion of the American Democracy been demanded for the perpetuity of American institutions, for the continuance of the American Republic against foes without and more insidious foes within, than in this year of grace 1916.

I am glad to come back to the bar in this time of its trials; I am proud of it. I believe in it, and I have confidence in the performance of its high duty in the future.

PUBLIC SERVICE BY THE BAR

ADDRESS AS PRESIDENT OF THE AMERICAN BAR ASSOCIATION AT THE ANNUAL MEETING IN CHICAGO AUGUST 30, 1916

ONE of the most striking effects of the great war is the extraordinary increase of national efficiency which has followed the spur of necessity. All over Europe among the struggling nations the virile and simple virtues have emerged from beneath habits of selfish indifference. Industry, inventive energy, thrift, self-denial, acceptance of discipline, subordination of individual preferences to the general judgment, loyalty to ideals, devotion to country and willingness to make sacrifices for her sake have become general. A new gospel of patriotic service has replaced the cynicism of privilege and personal advantage.

This change relates not merely to military efficiency but to the whole social economy and extends throughout the field of production and to all forms of consumption and waste. It carries a sense of individual responsibility by each citizen to help make his country strong by production and by conservation.

When the war is over we shall find ourselves in a very different world from that which witnessed the Austrian ultimatum to Servia. It will be a world in which the greater part of the nations return to the peaceful competition of production and commerce with a vast increase of power to compete caused by the training of hardship and sacrifice. Plainly, the neutral nations who have neither endured the sufferings nor achieved the rewards of this hard experience may not look with indifference upon these events. They should realize the increased efficiency which they will have to meet when

they enter again upon the competition in which all civilized nations must engage. In the amazing developments of these years there are lessons for us to learn which we must not ignore. There are lessons not merely as to submarines and aëroplanes and high explosives, but as to the whole effective capacity of the nation by which it maintains its place and progress in the world in peace as in war. No human power can withhold the United States from taking part in the international competition which will follow the return of peace. It is not a matter of volition. It cannot be controlled by legislation or by change of parties or by voting. The entire community of civilized nations is going through a phase of development from which no one of them can escape and continue to hold its own, and one of the necessary incidents of that development is competition in production and trade. The United States must therefore be prepared to meet competition carried on more effectively than ever before. The power of organization will be at its highest; the advantages of applied science will be greatest; the hindrances of internal misunderstanding and dissension will be at a minimum.

One of the most important features of the present European development for Americans to consider is the fact that it has been along the line of military organization and discipline. That surrender of individual liberty to superior control which is essential to the discipline and efficiency of an army has been extended to civil life and applied in governmental direction of productive industry, of transportation, and of consumption. The habits of communities accustomed to the least possible control over individual action proved wholly unfit in a sudden emergency to meet the military competition of highly disciplined masses. The question how far the abandonment of individualism and the establishment of rigid government control is to be continued or extended for purposes of efficiency in peaceful competition is of the highest

interest and importance to us. This importance is quite independent of the question how far it is probable that we shall be required to defend our wealth and security against aggression by armed force.

In either view it is plainly the duty of all Americans, whatever their calling, to consider by what means they can contribute through either the increase or the conservation of power in their own fields of action, towards the permanent higher efficiency of the people of the United States.

There is no body of citizens to whom this duty should appeal more strongly than to the lawyers, because the subject vitally affects the relations between the individual and the state regulated by law and the fundamental conceptions upon which our system of government is based.

There are two relevant truths of universal application and appeal. One is, that the people of the United States need in one important respect a change of the individual attitude toward their government. Too many of us have been trying to get something out of the country and too few of us have been trying to serve it. Offices, appropriations, personal or class benefits, have been too generally the motive power that has kept the wheels of government moving. Too many of us have forgotten that a government which is to preserve liberty and do justice must have the heart and soul of the people behind it — not mere indifference. Too many of us have forgotten that not only eternal vigilance but eternal effort is the price of liberty. Our minds have been filled with the assertion of our rights and we have thought little of our duties. The chief element of strength which the nations of Europe are acquiring is the spirit of their people, who have learned a new loyalty of devotion and sacrifice for their country. In a world where that spirit prevails the United States will slip back in the race unless we, too, have a new birth of loyalty and devotion.

The second general truth is, that national strength requires the spirit of solidarity among the people of the nation. Sectional or class misunderstanding and hatred or dislike are elements of vital weakness. To be strong a nation's citizenship must be a title to friendship and kindly interest among all her citizens. In a strong nation her people will be one for all and all for one. Every part of a country grows stronger with the prosperity of every other part. National wealth and prosperity are made up of the wealth and prosperity of individuals, and we cannot pull down each other without suffering as a people. The rights and privileges, the property and liberty and life of every American, whether he be at home or in Mexico or in the Far East, on land or sea, are our concern and the concern of each of us. Prosperity to him is a benefit to us ; misfortune to him is a loss to us; and it is vital to each one of us that we shall have such a country and such a government as shall put power and prestige and honor and active interest and inflexible resolution into the protection of every American whose necessities may come by circumstances to demand the performance of his nation's duty. Whenever a part of a people give themselves up to envy and jealousy of another part that may seem more prosperous, whenever a part of a people seek to equalize conditions by pulling down rather than by building up, the power of the nation begins to wane and the forces which should make the nation great and effective are impaired and wasted by internal controversy and diminished patriotism.

When we turn to the particular field occupied by our profession we cannot fail to see that our country would be made stronger if we could change some characteristics in our administration of the law.

There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of

effective working power, in the performance of this particular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the Bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the Bar with more lawyers than are necessary to do the business. Of the one hundred and fourteen thousand lawyers in the United States, according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the one hundred and fourteen thousand would be discharged. We at the Bar are not producers. We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be

set to some other useful work. There is plenty of work for them to do on the farms of the country.

Why is it that these defects exist in American administration of justice? The American people are not quarrelsome or litigious. They are good natured, practical, simple, and direct in their methods of transacting their individual business, respecters of law, and honest in their dealings. Our Bar as a whole is courageous, loyal, and able. Our judges as a whole are just, high-minded, and competent. Why do we transact the business of administering justice in such an unbusinesslike way? It is not difficult to point out particular laws and methods which are defective and to say that they ought to be changed; but there is still the question, how did they become defective, and why, after all our experience, do they continue defective?

I think the underlying cause of this defective administration of justice is that the Bar and the people of the country generally, proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude which I have mentioned, in which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country. Our political system makes such an attitude on the part of the Bar very natural and easy. With our highly developed individualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights, it is quite natural that lawyers employed to assert the rights of individual clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of

the same procedure. It is natural that the same habit of thought should be carried into our legislatures by the lawyers who make up the greater part of those bodies; and with our governments of narrow and strictly limited powers it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community. There are indeed two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the Bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the Bar and the legislatures and, in a great degree of the public, towards the exclusively individual view.

The public tendency is exhibited at the very beginning of the whole business in permitting admissions to the Bar without adequate education and training. Few ideas have been more persistent throughout this country than the idea that the prevailing consideration in determining admission to the Bar should be that every young man is entitled to his chance to be a lawyer and that all requirements of attendance in offices and law schools and for difficult examinations are so many obstacles in the way of liberty and opportunity, defenses of aristocratic privilege and derogations from democratic right. The law schools have been slowly winning their way along the lines of better training for the Bar, but the progress is very slow and the pressure for brief and easy ways to get a license to practice is continuous. Only last year the Massachusetts legislature, by statute, reduced the requirements of school attendance for admission to the Bar to two years of evening high school, following upon an agitation carried on in support of the principle, " Let every man have

his chance." One of our states, and a very great state indeed, with a very high average of general cultivation, permits anyone of good moral character to practice law. Correspondence schools of law flourish, proceeding upon the idea that a man can become a lawyer incidentally by reading law books in spare hours as he goes along with his ordinary occupation. The constant pressure of democratic assertion of individual rights is always towards reducing the difficulty of bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand; by interlocutory proceedings which never ought to have been taken and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time with worthless evidence and useless dispute in the trial of causes; by superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the Bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense. There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere

individual success. To the student of the law, there come from Hortensius and Cicero, and Malesherbes and DeSeze, and Erskine and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical or seeking unfair advantage — a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice — that we must look for the effective administration of the law. The old customs under which the young law student was really guided and instructed in the law office of the established practitioner, under which the youth was impressed by the example and spirit and learning of his senior, are rapidly passing away. In the greater part of the country these customs no longer continue. The Law school has taken the place of the law office, except for acquiring the mere technique of practice, and the rights of the people of the United States to have an effective administration of the law require that the standards of the best law schools shall be applied to determine the right to membership in the Bar. When we compare our own method with the test of the three years' probation of the French Licentiate and the arduous four years' training of the German Refendar we may realize how little the American people have had in mind the protection and promotion of the public interest in requiring competency at the Bar.

No one can help sympathizing with the idea that every ambitious young American should have an opportunity to win fame and fortune. But that should not be the controlling consideration here. The controlling consideration should be the public service, and the right to win the rewards of the

profession should be conditioned upon fitness to render the public service. No incompetent sailor is entitled to command a public ship; no incompetent engineer is entitled to construct a public work; no untrained lawyer is entitled to impair the efficiency of the great and costly machinery which the people of the country provide, not for the benefit of lawyers but for the administration of the law.

The same failure to realize that the Bar has public duties as well as privileges has affected the relations which American legislation has sought to establish between the Bar and the Bench in the conduct of the business of the courts. In the hearing and decision of causes in all their stages the judge represents the public interest; the lawyers in the case represent primarily their particular clients. It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken; that witnesses are protected against improper treatment; that the public time is not wasted. On the other hand, it is the business of the lawyer to conduct a case so that his client will win. His relations to the case tend to give him a one-sided view of what is just and fair in that case. The ardor and stress of conflict are not favorable to abstract considerations of justice. He is concerned in exhibiting the facts which will help his client; in stating the law upon which his own side relies; in breaking down witnesses against him and strengthening witnesses in his favor. On each side counsel plays the game for all that it is worth and sometimes superiority of counsel outweighs superiority of merit. Doubtless this contention, this struggle between the opposing sides of the case, is the best possible way in the long run to reach just results. But it is plain that in all the transaction the representative of public justice is the judge on the bench and that there is necessarily between

him and the counsel on each side always a certain antagonism and contention. The natural tendencies of the American people emphasize this antagonism. We are restive under authority. We do not yield readily to discipline. We are unwilling to accept defeat. In every game we exaggerate the importance of success in comparison with all the rest of life. The restiveness of the Bar under the control of the judge on the bench finds its expression very widely in our legislation regarding procedure. That legislation is of course framed by the lawyers in our legislatures, and unconsciously, doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the Bar against interference from the Bench.

The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, prohibiting the judge from expressing any opinion to the jury upon questions of fact. From time immemorial it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury ? It is to make it certain that the individual advantage gained by having the more skillful lawyer shall not be taken away. It represents the individual's right to win if he can and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. The fact that such provisions can be established and maintained exhibits a democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purposes.

Under the influence of the same disposition a large part of the detailed and specific legislative provisions regulating practice are really designed to enable law business to be carried on without calling for the exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts. A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the Bar itself.

The present condition of our law presents very strong reasons why lawyers should awaken to a sense of responsibility for another and still more serious service which will require a Bar made strong by the application of stringent tests for admission, and by the best work of the best law schools in its training. The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right; and then the door would be thrown wide open for the rule of men rather than the rule of law, and for the exercise of personal injustice as well as personal justice. We are approaching a point where we shall run into confusion unless we adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. The slow development of the common law with its rich product of legal ideas and remedies has followed the lines of legal principles; but at all

times the application of legal principles has been conditioned upon the customs from which the law has been evolved and to which the rules established have been applied. It is no slight task for discriminating intelligence to distinguish the principles which have been applied from the incidents of their application, arising from the social and industrial and political conditions of the day, involved in the multitude of reported cases that record the progress of the common law. Yet it is continually more important that the Bar at large shall be trained to see through the precedents and the incidents to the controlling principles. A few men are already taking the lead in the work of classification — some, great teachers ; some, great judges ; some, great practitioners. But these few play only a small part in administering the law. Thousands of judges and tens of thousands of lawyers in all the cities and villages of this great country are doing that, and the problem of classifying and simplifying our law involves the need to carry to the great mass of them, present and future, a comprehension and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions. How can that be done ? Not by writing text books ; the book stores swarm with them already. Not by preaching reform ; nobody listens. Not by the imposition of a system to be accepted, as Continental Europe accepted the Roman law. No such system would be accepted. It would be ignored. All our instincts are against it. Some very able and public-spirited lawyers have been for some years urging the organization of a definite and specific movement for the restatement of our law ; for a new American Corpus Juris Civilis. They are quite right. It ought to be done. But who is to do it and how shall he be recognized as a prophet ? Can we elect him by popular vote? Can we select him upon our own acquaintance with men of genius and self-devotion ?

No. Such a man or such a group of men must be the product of natural selection. They must be evolved by the conditions of life, and they must speak to an audience prepared to listen.

The only way to clarify and simplify our law as a whole is to reach the lawyer in the making and mold his habits of thought by adequate instruction and training so that when he comes to the Bar he will have learned to think not merely in terms of law but in terms of jurisprudence. The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. He is thus preparing not merely to accept formally dogmatic statements of principles but to receive and assimilate and make his own the systematic thought and learning of the world in the science of jurisprudence. With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal ; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work. Pour sand slowly upon the level ground ; the conical pile produced will have a fixed relation between the area of its base and the height of the cone. It is so with human society. We must broaden knowledge and spirit to build up and we must build up to broaden.

To deal with American law as it is, however, is but half the problem. We are in the midst of a process of rapid change in the conditions to which the principles of law are to be applied, and if we are to have a consistent system that change must be met not at haphazard but by constructive development. The industrial and social changes of our time

have been too swift for slowly forming custom. Old rules, applied to new conditions never dreamed of when the rules were stated, prove inadequate too suddenly for the courts readily to overtake them with application of the principles out of which the rules grew. We have only just begun to realize the transformation in industrial and social conditions produced by the wonderful inventions and discoveries of the past century. The vast increase of wealth resulting from the increased power of production is still in the first stages of the inevitable processes of distribution. The power of organization for the application of capital and labor in the broadest sense to production and commerce has materially changed the practical effect of the system of free contract to the protection of which our law has been largely addressed. The interdependence of modern life, extending not merely to the massed city community but to the farm and mine and isolated factory, which depend for their markets and their supplies upon far distant regions and upon complicated processes of transportation and exchange, has deprived the individual largely of his power of self-protection, and has opened new avenues through which, by means unknown to the ancient law, fatal injuries may be inflicted upon his rights, his property, his health, his liberty of action, his life itself. We have not yet worked out the *formulae* through which old principles are to be applied to these new conditions — the new forms perhaps through which the law shall continue to render its accustomed service to society. The arrival of new conditions to which the law must be adapted has its counterpart in the desuetude of old customs and the disappearance of the basis for old rules. The process of change in a nation's standards of conduct in life, which has made the Blue Laws of Connecticut a familiar evidence that laws once vigorous may die a natural death without repeal, is always going on. It is a part of the method by which the common law has de-

veloped. But that process seems to have been much accelerated in recent years. Take for example the community's standard of conduct as applied to the domestic relations, the change in the customary rights and duties recognized between parents and children, masters and servants, husbands and wives, the general relation between the sexes, which apparently is about to receive a new impulse towards change from the extension of women's work in Europe owing to the war.

These rapid changes of conditions to which the law has to be adapted furnish the chief reason why we are bombarded by such a multitude of statutes, good, bad, and indifferent, seeking to accomplish changes by express prohibitions, commands, and statutory remedies. This mass of statutes proceeds from natural impulses to hasten the development of the law in its application to conditions which move too rapidly for customs to form. Many of them will be futile, many will be abandoned, many will be modified, many will prove to be valuable contributions to the development of the law, many will prove to have been steps in the wrong direction and to retard development. Taken altogether, they are themselves making customs from which the law of the future is being evolved.

Doubtless a large part of the irritation and prejudice against the courts in recent years has been due to the misunderstanding of those who in their impatience set the courts down as opposed to progress because they themselves do not realize that there has been a progressive development of our law to meet the new conditions, but that by the nature of the institution such development must follow and not precede the public conviction of its necessity.

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its

machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.

The development of our law under the conditions which I have pointed out will be accompanied by many possibilities

of injurious error. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their life and adapted to their character and the genius of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling, often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulses, the immediate needs, the sympathies and passions, the idealism and selfishness, of all the vast multitude who are really from day to day building up their own law. No matter what legislatures and congresses and publicists and judges may do, the people are making their own law today as truly as in the earlier periods of the growth of the common law. No statute can ever long impose a law upon them which they do not assimilate. Whether repealed or not, it will be rejected and become a dead letter. No decision that is inconsistent with their growth can long resist the pressure to distinguish

and overrule. What can be done, what must be done to make true and uninterrupted progress is that those members of the democracy to whom opportunity has brought instruction in the dynamics of law and self-government, shall so lead and direct the methods of development as to respond to the noblest impulses, the highest purposes, the most practical idealism, of this great law-making multitude, so that the growth of the law shall receive its impetus from the best and not from the worst forces of the community, and be guided by the wisdom and not the folly, the virtues and not the vices, of the people.

There will always be danger of seeking lines of law development which appear upon the surface to be progress, but which are really an abandonment of progress. Long-continued advance in this world in any useful direction is difficult and slow. Progress in self-government requires the self-governing people to apply rules of action to their own conduct; to limit themselves by self-denying ordinances; to restrain their own impulses and cure their own faults. There must be many shortcomings in such an effort. It is a hard road to travel, and wearisome, and success must be long deferred. Human nature turns readily to any proposal of swift and easy reform which may relieve it of the burdensome task of self-control by the exercise of compulsion on some one else. That is not reform; it is surrender. Infinite harm may be done by such attempts and long wandering and confusion of effort may ensue; but if the people are to go on with the development of their free self-government they must ultimately come back to take up themselves the burden which they have sought to escape.

There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and the state government. Upon the preservation of that balance, not necessarily

in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty. There is a continual tendency to restrict the exercise of national authority wherever it interferes with the local convenience or interest of a particular state or group of states; and, on the other hand, there is an equally persistent tendency to call in the exercise of national power to perform the duties of local government where states lack effectively organized power or wish to be spared expense or see an opportunity to get money out of the national treasury for local use, or where some portions of the country wish to impose their ideas on the remainder of the country. The same states that are unwilling to give the national judiciary jurisdiction to enforce the protection of aliens promised in national treaties or to permit a national force of citizen soldiery to be commanded by officers appointed by the national executive instead of militia officers appointed by the governors of the states, will urge Congress to pass sumptuary laws controlling the private life and conduct of affairs in local communities and will hand over to the national government strictly local regulations for the sake of an appropriation. Powers thus conferred under special motives and for special purposes do not revert. They are continued. And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national power and local liberty in our system, will be destroyed and the breaking up of the Union will inevitably follow.

More critical still is the danger of too great a reaction from the system of free contract upon which our government has

long been developing — a reaction which will destroy the basis of individual liberty upon which our institutions rest. We are in the midst of a reaction now. It was inevitable. The individualism which was the formula of reform in the early nineteenth century was democracy's reaction against the law and custom that made the status to which men were born the controlling factor in their lives. It was an assertion of each freeman's right to order his own life according to his own pleasure and power, unrestrained by those class limitations which had long determined individual status. The instrument through which democracy was to exercise its newly asserted power was freedom of individual contract, and the method by which the world's work was to be carried on in lieu of class subjection and class domination was to be the give and take of industrial demand and supply. Now, however, the power of organization has massed both capital and labor in such vast operations that in many directions, affecting great bodies of people, the right of contract can no longer be at once individual and free. In the great massed industries the free give and take of industrial demand and supply does not apply to the individual. Nor does the right of free contract protect the individual under those conditions of complicated interdependence which make so large a part of the community dependent for their food, their clothing, their health and means of continuing life itself, upon the service of a multitude of people with whom they have no direct relations whatever, contract or otherwise. Accordingly, democracy turns again to government to furnish by law the protection which the individual can no longer secure through his freedom of contract and to compel the vast multitude on whose coöperation all of us are dependent to do their necessary part in the life of the community. Plainly, in some directions and to some extent such governmental control is necessary; but we should not forget that every

increase of governmental power to control the conduct of life is to some extent a surrender of individual freedom and a step backwards towards that social condition in which men's lives are determined by status rather than by their own free will. We should be careful that in promoting the efficiency of government we do it by the just application and not by the surrender of the true principles upon which our government is founded. Let me state the case in its simplest terms: The central principle of our system of government is in the proposition that every man has a right to full and complete individual liberty, limited only by the equal liberty of every other man. From that right all others are deduced; the right to life, to property, to the pursuit of happiness, are its corollaries. Our whole system of law is in its essence only the enforcement of the reciprocal limitations of individual liberty. It is a compulsion upon me to limit my liberty by yours and upon you to limit your liberty by mine. The justification of all laws and customs which constrain human conduct is that they are necessary and appropriate for the preservation of the liberty of others. Whatever law passes beyond that limit and seeks to impose upon the individual the ideas of others as to what his conduct should be, whether to subserve the interests of others or to conform to their prejudices or to their ideas of propriety or wisdom, even though those others may constitute an overwhelming majority of the whole community, is a violation of the principles upon which our government was formed; is not the just exercise of governmental power, but is essential tyranny. The test is difficult of application. The incidence and the ultimate effect of law are often indirect and obscure. They depend upon a multitude of conditions imperfectly known and subject to controversy. The highest intelligence and the broadest knowledge are needed for the application of the test; but upon a sincere and unremitting effort that it shall

be applied in every step of the development of our law depends the question whether that development shall destroy or shall deepen and strengthen the foundations of our free government.

What part is the Bar to play in this great work of the coming years? Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases? During all our mature lives, in many courts and upon many occasions we have been asserting rights, protecting property, preserving liberty, by appeals to the law, to the great rules of right conduct written into our constitutions; protesting against the abuse of official power, extolling justice, pleading for loyalty to our free institutions. Have we meant it? Has it all been mere talk for the purpose of winning cases? Have we never really cared about law and justice except as available instruments to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law? As a rule the leaders of the Bar devote themselves to their individual practice. As a rule the younger and least experienced lawyers make up the state legislatures. There are exceptions, but that is the rule. Even in the National Congress, although the average of ability and strength is much higher than the public seems to suppose, comparatively few lawyers of the first order make their appearance. The questions involved in the development of the law are seldom adapted to interest an audience in political discussion. The real consideration and discussion and the mature conclusions worthy to be followed must be among the practitioners, the judges, the teachers of the law. The fitness of a people for self-government is measured by their capacity to set up and maintain institutions through which government can be

carried on effectively, and responsibly. That rule applies to all large bodies of free agents having a common purpose. It applies to the one hundred and fourteen thousand lawyers of the United States. We must have institutions through which our duty can be done if it is to be done. In response to that necessity came the Associations of the Bar — the six hundred local and state associations and this great national organization. Here is at hand an institution for the public service of the profession of the law. To enlarge its membership, to improve its procedure, to increase its scope and efficacy, to strengthen its authority and its appeal in the real life of our time — these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American Bar.

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